IMPACT OF DEREGULATION ON THE AIR TRANSPORTATION MARKETING SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND RESTRAINT OF TRADE ACTIVITIES AFFECTING SMALL BUSINESS

OF THE

COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

WASHINGTON, D.C., MAY 24, 1983

Printed for the use of the Committee on Small Business

U.S. GOVERNMENT PRINTING OFFICE
25-725 WASHINGTON : 1983

H 721-28

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IMPACT OF DEREGULATION ON THE AIR TRANSPORTATION MARKETING SYSTEM

TUESDAY, MAY 24, 1983

House of Representatives, Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, Committee on Small Business,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:10 a.m., in room 2359-A, Rayburn House Office Building, Hon. Thomas A. Luken (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN LUKEN

Mr. Luken. Good morning. We want to move along with this hearing because of the conflicts that some of the witnesses, and obviously the members, have later on in the day. We thank you all for your early appearance this morning.

I call to order this hearing on the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business.

Today we will be reviewing the impact of airline deregulation on the marketing of airplane tickets. In particular, we will be examining the impact of the December 1982 Civil Aeronautics Board decision, which may alter the travel agency system substantially over the next few years.

This morning we will be hearing from the Chairman of the CAB, as well as from many of the affected parties. The members of the subcommittee want to explore the reasons for the Board's decision to alter the system of ticket sales which has been in effect for almost 40 years.

We will be looking into our crystal balls in an attempt to predict what the travel agency system will look like after the marketing system's antitrust immunity is withdrawn.

Under the current system, approximately 21,000 travel agencies are accredited to sell airline tickets. Most of these agencies are small businesses, and this subcommittee is concerned about their economic survival and well-being. We will seek to determine if the changes instituted by the Board threaten these agencies in any substantial way.

The travel and tourism industry in this country is growing. This Congress is taking an increasing interest in that industry at a time when many of our industries, especially in my part of the country, cannot make similar claims.

Some have forecast that it will be the world's top industry by the turn of the century. Travel agents have a major role to play in this growth, and we want to make certain that major alterations will not destroy one of our most successful industrial sectors.

Mr. Weber.

Mr. **Weber**. Thank you, Mr. Chairman. Because of the time constraints, I won't have a formal opening statement. I would like to commend you for holding these hearings, and I just want to say that as we proceed today I think we have a lot of things to consider.

We have to consider the impact of the decisions we are making here on the airline industry, on the travel agency industry. Perhaps, most important of all, we have to consider the needs of the airline traffic customers.

In particular interest to me is the impact of these decisions on the occasional traveler, the traveler who is perhaps less used to using the airways and perhaps is somewhat more vulnerable for that reason. As we proceed through the hearing this morning, I think that is what I am going to be most interested in exploring.

I want to again thank you, Mr. Chairman. I look forward to the testimony of our witnesses.

Mr. **Luken**. The gentleman from Indiana.

Mr. **McCloskey**. No, thank you.

Mr. **Luken**. Our first witness is Hon. Dan McKinnon, Chairman of the Civil Aeronautics Board.

TESTIMONY OF DAN McKINNON, CHAIRMAN, CIVIL AERONAUTICS BOARD

Mr. **McKinnon**. Mr. Chairman, I am delighted to be here with you today, and members of the subcommittee.

As a small businessman for 20 years before I came to Washington, I am especially pleased to be appearing before you today on behalf of the Civil Aeronautics Board to discuss an issue that has an impact on one segment of the small business community.

With your permission, I have copies here of the Board's decision in the competitive marketing case and our order on reconsideration for inclusion in the record. You will find the Board's decision summarized on pages 3 through 13, and I would like to provide them for you for the record.

Mr. **Luken**. Without objection, it will be received.

[The decision and order follow:]

82-12-85

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

INVESTIGATION INTO THE COMPETITIVE MARKETING OF AIR TRANSPORTATION-- AGREEMENTS PHASES

DOCKET 36595

Decided: December 16, 1982.

As modified, agreements of the Air Traffic Conference of America establishing a system for the common accreditation of passenger agents, and agreements of the International Air Transport Association establishing systems for the common accreditation of passenger and cargo agents are found not adverse to the public interest and not to substantially reduce competition within the meaning of Section 412 of the Federal Aviation Act, as amended;

As modified, agreements of the Air Traffic Conference of America establishing a clearinghouse for the settlement of accounts between passenger agents and air carriers are found not adverse to the public interest and not to substantially reduce competition within the meaning of Section 412;

Provisions of the agreements which require air carriers to deal only with agents accredited by the conferences are found to violate the Federal Aviation Act. However, continued approval of those provisions until December 31, 1984 to the extent they preclude the use of nonconference agents to write interline sales is found necessary to attain important public benefits;

Additional disapprovals, found required by the Federal Aviation Act, are detailed in the opinion; and

Grant of antitrust immunity for agreements establishing systems for the common accreditation of passenger agents, for agreements establishing a system for the common accreditation of cargo agents, and for agreements establishing a clearinghouse for the settlement of accounts between passenger agents and air carriers until December 31, 1984 are found to be required by the public interest.

Appearances:

Same as in the administrative law judge's initial decision, except as follows:

Richard Stein for the National Passenger Traffic Association
Frank Cotter for U S Air, Inc.
Robert Duggan and Pamela Reynolds for Eastern Air Lines
John Simpson for Air Cal

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OPINION

BY THE BOARD:

INTRODUCTION

In calendar year 1979, sales of scheduled passenger air transportation in the United States were $18.7 billion. Of that amount, more than half was sold by travel agents. [1] Almost 20,000 agent locations provide air carriers with sales outlets throughout the United States. [2] Air carriers do not deal with each agent individually but through their trade associations. Most major air carriers providing interstate and overseas air transportation are members of the Air Traffic Conference of America (ATC), which sets standards for travel agents selling overseas and domestic air transportation. Its international counterpart, for travel agency purposes, is the International Air Transport Association (IATA).

We do not have direct regulatory responsibility over travel agent activities. Our role derives from section 412 of the Federal Aviation Act, 49 U.S.C. 1382, which provides for the filing of agreements between air carriers, such as those establishing systems for the common accreditation of agents. Section 412 requires us to approve an agreement unless it is adverse to the public interest or in violation of the Act. It prohibits us, however, from approving any agreement which would substantially reduce competition unless the agreement meets serious transportation needs or provides important public benefits that cannot be achieved by reasonably available, less anticompetitive alternatives. In addition, we have the authority to shield agreements we have approved from the operation of the antitrust laws by conferring antitrust immunity pursuant to section 414 of the Act.

The ATC and IATA agreements establishing systems for the common accreditation of passenger agents were first filed with us in the 1940's. Since our initial approvals and grant of antitrust immunity, the agreements have continually been revised through the process of repeated amendments. The system of rules now in place is an extensive one, governing most facets of the travel agent-air carrier relationship.

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[1] ASTA-20 at 30. Agents sell approximately 54% of domestic air transportation and 70 to 80% of foreign air transportation. ASTA-20 at 30, IATA-T-4 at 5-6, I.D. at 40. Of course, the figures for individual air carriers vary significantly. See the figures for various carriers set out in Appendix B. A recent study of the travel agency industry indicates that the amount of domestic air transportation travel agents sell continued to increase significantly each year through 1981. Travel Weekly's Louis Harris Study at 17, 23, May 1982.

[2] See, page 16 n.28, infra.

This proceeding was begun in September 1979, by Order 79-9-64, at a time when we were reviewing each of the areas of our regulatory responsibility in light of the procompetitive mandate of the airline deregulation movement. [3] We proposed to re-examine our approval and grant of antitrust immunity to air carrier agreements governing entry into the air transportation marketing industry, particularly those creating a system for the common accreditation of agents. In addition, the proceeding also considered IATA agreements relating to the sale of cargo air transportation through agents and ATC agreements establishing the Standard Ticket and Area Settlement Plan (ASP) by which accounts are settled between passenger agents and air carriers. [4]

A hearing was held before Administrative Law Judge Ronnie A. Yoder. Thousands of pages of documents were submitted for the record and ninety days of testimony were heard. Judge Yoder's initial decision was served on June 1, 1982. For the most part, Judge Yoder found that the Board should continue to approve the ATC and IATA agreements at issue. He concluded that the travel agency system that has grown up under these agreements does not lessen competition in the sale of air transportation services and that the current travel agency system provides many important public benefits and serves important transportation needs. Judge Yoder also found that the Board should continue to grant the agreements antitrust immunity. [5] In our instituting order we determined that we would review the decision of the administrative law judge in its entirety. [6]

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[3] While air carrier entry and pricing were our first priorities, we reviewed all our functions, including for example, our airline merger policies, our regulation of air freight forwarding and charter transportation.

[4] While the agreements establishing the agency systems and the ASP are the major agreements at issue, there are others, including agreements dealing with IATA general sales agents, cargo settlement systems and IATA settlement standards.

[5] Judge Yoder's specific conclusions will be considered throughout this opinion. Except to the extent modified or disapproved we adopt his conclusions as our own. His Initial Decision is attached as Appendix A.

[6] Order 79-9-64 at 4. See also Order 82-6-54, June 9, 1982.

Briefs and reply briefs have been filed [7] and oral argument was heard on September 15 and 16, 1982. [8]

SUMMARY OF OUR DECISION

A. Overview

Our task in this proceeding involves the review of the air transportation sales network, which is the product of almost 40 years of carrier agreements and Board orders. Our decision will set the course for air transportation marketing for the indefinite future. During the period of close regulation of airline activities, we could permit air carriers to agree on their marketing systems. Marketing systems founded upon joint carrier decisionmaking complemented the tightly regulated air transportation industry. In both instances, competition occurred only within narrowly defined parameters. Implicit in this tightly regulated scheme was the judgment that competition could not be relied upon to produce the optimal air transportation services.

With the Airline Deregulation Act (ADA), Congress rewrote the operating assumptions in the airline industry. Government oversight of fares and services was replaced with reliance upon market forces to determine which carriers provided service and at what prices. Of course, the new reliance on competition has not been limited to entry and fares, but is to be the basis for all our decisions. [9] That must be our starting point in this case. Absent a demonstration that the public would be better served by solutions that cannot be attained in a competitive environment,

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7/ Briefs to the Board were filed by the following parties: ATC, IATA, American Airlines, Inc., the American Automobile Association (AAA), American Express Company, the Association of Retail Travel Agents (ARTA), the American Society of Travel Agents (ASTA), Associated Travel Nationwide (ATN), the Bureau of Domestic Aviation (BDA), A.V. Costantini, the Department of Justice (DOJ), the Department of Transportation (DOT), Hawaiian Airlines, Inc. jointly with Aloha Airlines, the International Airforwarder and Agents Association (IAAA), Northwest Airlines, Inc., Ticketron Division of Control Data Corp., and the National Passenger Traffic Association (NPTA). The Hawaiian/Aloha and Northwest filings were accompanied by motions for leave to file an otherwise unauthorized documents, which we will grant.

8/ Motions to correct the transcript of oral argument were filed by ATC, ASTA, ATN, BDA, IATA and IAAA. These motions will be granted. ATC has also filed a motion to mark for identification and receive in evidence a post oral argument exhibit. No one has objected to the motion, and we will grant it.

9/ Sections 102(a)(4) and 102(a)(9) of the Federal Aviation Act of 1958 (the Act) as amended by the ADA, 49 U.S.C. 1302(a)(4) and 1302(a)(9) specifically establish reliance on market forces, and fostering a competitive environment as elements in the public interest in all Board actions, including actions under section 412. In addition, both section 408 49 U.S.C. 1378 (mergers) and section 412 contain a specific prohibition on Board approval of anticompetitive acts except under unusual circumstances.

the air transportation marketing industry must be opened to the normal operation of market forces.

As a result, we approach arguments that competition is necessarily destructive and that government intervention is preferable to the free marketplace with a large measure of skepticism. Unsubstantiated fears that competition will produce less desirable results than those produced under regulation are simply not a sufficient reason to protect the present system from competition.

At one time we suggested that the only means of inducing competition into the air transportation marketing system was to disapprove the complex agreements governing the air transportation industry. We do not now believe that disapproval of the agency agreements in their entirety is either required by the antitrust laws or wise as a matter of policy. Past regulation has undoubtedly fostered a system that is more comprehensive and intrusive into individual business decisions than a distribution system that would have arisen under purely competitive conditions. But regulation also attempted to insure that participation standards were objective, embodied procedural safeguards, and served air carrier interests in expanding the number of sales outlets. Because the existing sales network offers competitive advantages, there are sufficient reasons not to discard the legacy of regulation.

Our review of the record in this proceeding has led us to conclude that the forces of competition can be brought to bear on the marketing industry by eliminating those provisions that prevent air carriers from using and compensating persons other than agents accredited by their trade association for selling air transportation. With the elimination of these so-called exclusivity provisions, persons who may be able to meet portions of airlines' or consumers' demands more efficiently than travel agents will be free to contract with air carriers to sell their services. This new group of potential entrants is not likely, in our view, to displace the existing travel agency network. Travel agents are, at the present time, a very efficient means of distributing air transportation services. Rather, the possibility of entry by competing distribution modes will provide the spur to continued efforts to attain greater efficiencies fundamental to competitive economic performance.

We will not, however, immediately disapprove the exclusivity provisions in their entirety. We have decided to phase out the exclusivity provisions of the ATC and IATA passenger agency programs, and the IATA cargo agency programs in two stages. Upon the effective date of this order, the exclusivity provisions will be disapproved to the extent they preclude a conference air carrier from paying a commission or other sales remuneraton to any person, other than a conference agent, selling its own air transportation. There is no reason to preclude an air carrier from deciding to use and compensate a nonaccredited agent when only that air carrier's services are involved.

However, air carriers have also entered into agreements with one another which permit one air carrier, or anyone selling air transportation on its behalf, to write tickets which include another carrier's services. Where such interline tickets are involved, one air carrier has a limited interest in the quality of another carrier's distributor. The interest does not stictly relate to the financial responsibility for the ticket because the carrier whose ticket is used is responsible for payment to all transporting carriers on the flight itinerary. Instead, the interest is in insuring that the ticket is properly written and consumers are not inconvenienced, which would redound in ill-will against the transporting carrier.

Because existing interline agreements were entered into with the exclusivity provisions in place, it is unlikely that carriers considered the use of non-accredited distributors by their interline partners. To afford carriers the opportunity to reconsider the terms of their interline agreements, in view of our decision here, we will continue to approve the exclusivity provisions to the extent that they preclude the use of and payment of commissions or other sales remuneration to non-accredited agents by conference members for the sale of interline transportation until December 31, 1984. Our continued approval of the provision will prevent an air carrier from using non-accredited distributors to write tickets involving interline transportation in the absence of an agreement between or among interlining carriers that provides otherwise.

We believe this approach in conjunction with our decision to withdraw antitrust immunity from the programs in two years insures a smooth transition to a more competitive environment. It provides a period of time for air carriers to reconsider how their service is distributed and is responsive to concerns about a decision that would require drastic changes in the marketing of air transportation. Our transitional approach very carefully balances the divergent interests of air carriers, travel agents, and potential entrants into the marketing industry.

Moreover, we can find no basis to conclude that allowing more competition in the air transportation distribution system will threaten travel agents accredited under the current agreements. Application of competitive principles that apply to unregulated industries is not incompatible with the basic structure of a distribution system in which air carriers use common agents. We are convinced that our disapprovals in this case will have little, if any, adverse effect on the air transportation system or the travel agent industry. Air carriers have been and will continue to rely on travel agents to sell a substantial volume of air transportation.

Our required revisions will merely permit competition to occur. We will require no changes. As a legal matter, we are disapproving an agreement among competitors that unnecessarily restricts competition. Individual carriers will not be required to act any differently than they do today, as long as this choice reflects an individual carrier's independent judgment and is not the consensus of competitors. Nor will our decision require any changes in the way individual travel agencies operate.

Although we have approved virtually all of the provisions relating to the accreditation programs, this does not necessarily mean that these standards are perfect. Some standards may be more rigorous than those that would evolve in a competitive market. We have not, however, attempted to refine the standards of the program so that they duplicate those that would have arisen had we not regulated the industry. It is unlikely that we could do so. We prefer that the standards be changed in response to the normal operation of market forces. For that reason, we intend to withdraw antitrust immunity from the passenger agency programs after a period of transitional immunity.

This decision reflects our belief that adherence to competitive principles is beneficial to all concerned. Airlines will be able to make individual marketing decisions responsive to consumer demands. Travel agents will have enhanced freedom to operate their businesses without undue carrier interference. Consumers will benefit because competition insures that they receive the most efficient, lowest cost air transportation. If the present system already exhibits these traits, as their proponents contend, then there will be no significant changes from the distribution system now in place. If the system can be improved, then the unfettered operation of the market will result in greater consumer benefits. Finally, eventual withdrawal of antitrust immunity will remove the need for government oversight.

The issue is not, then, whether the existing system works well but rather whether it can be improved under more competitive conditions. In the end, we think that the distribution system that evolves should be determined by the marketplace, consistent with our goals under deregulation. We have adopted an approach designed to ease the transition to a more competitive environment. Our decision reaches a proper accommodation between the procompetitive demands of the Airline Deregulation Act, and the concerns that have been expressed about preserving the benefits of the existing system.

B. Legal Standards

In the context of section 412, we have been guided by the principles developed under section 1 of the Sherman Act in determining whether an agreement would substantially reduce competition. At one time, we thought that these principles might require disapproval of the agreements. The present travel agency agreements severely constrain the distribution decisions of all air carriers. Decisions about the distribution of services can be viewed as central to the competitive functioning of the marketplace. Therefore, an agreement among competitors that involves such relationships could be viewed as inimical to the antitrust laws.

Our review of the antitrust laws, however, has made it clear that some forms of cooperative behavior are permitted. At times, cooperative agreements actually enhance competition by making the manufacture or sale of goods or services more efficient. In such circumstances, costs to the producers are lowered, and these savings could be passed on to consumers.

Disapproval of the agreements in their entirety would not, in our judgment, give proper recognition to the efficiencies that are achieved through the integration of certain functions under the auspices of the carrier trade associations. We are convinced that with modifications the basic air transportation distribution system can be conformed to the demands of the antitrust laws without jeopardizing its essentially pro-competitive features.

The ATC and IATA agreements which set standards for common passenger agents reduce the cost of securing sales outlets to individual carriers. Air carriers can appoint many more agents than they could if each carrier set its own appointment standards and bore the cost of screening, monitoring and disciplining its individual agency network. The cost of entry and exit into new markets is reduced because air carriers do not have to bear the cost of establishing a new distribution network. Travel agents, in turn, are in a position to sell the services of more air carriers and the public is given a greater choice of service options.

The antitrust laws do not, however, permit cooperative agreements that place unreasonable restraints on competition. An agreement's provisions must be related to its efficiency objectives and be tailored to place no greater restraint on competition than is necessary to accomplish those objectives. For example, an otherwise acceptable joint venture that includes restraints to allocate markets that are not necessary to achieve efficiencies has been found to be anticompetitive. 10/

C. Exclusivity

The provisions of the ATC and IATA agreements that require air carriers to use and pay remuneration to only conference approved travel agents--the exclusivity provisions--have had a substantial effect on air transportation distribution systems. They effectively eliminate the possible use of other persons as agents in the sale of air transportation. Air carriers cannot, then, obtain the benefits of the conference systems and experiment with other marketing outlets, some of which may be able to serve portions of the air transportation market more efficiently.

It has been argued that the effect of the exclusivity provisions can be limited so they only govern dealings with agents, leaving carriers free to deal with other non-agent marketers. Non-agent marketers, then, would provide the disciplining effect fundamental to competitive market performance. We conclude that the exclusivity provisions cannot be interpreted in this manner. The IATA exclusivity provisions, which have always been limited to agents, have in fact precluded marketing innovations just as effectively as the ATC provisions which refer to both agents and marketers. Moreover, our review of the record demonstrates that agency is a very broad term, foreclosing most types of entry that might occur in the

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10/ See U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972). See also Sullivan, Antitrust §80 (1977).

marketing industry. As a result, as long as the exclusivity provisions are in place, the opportunity for disciplining entry is extremely remote.

It has also been argued that the exclusivity provisions are necessary to achieve the efficiencies of common accreditation. Some parties maintain that absent the exclusivity provisions, carriers and agents will abandon the common accreditation system. In essence, they argue that exclusivity is necessary to induce carriers and agents to participate in the joint venture. However, common accreditation affords carriers (and agents) a significant potential for scale efficiencies they could not otherwise obtain. A system of common accreditation that is reasonable under the antitrust laws provides its own inducement to participants. If carriers really regard the venture as yielding efficiencies, they will participate in the common accreditation program regardless of the existence of the exclusivity provision. They will use other marketers only where they are more efficient, innovative, or serve different market demands.

Exclusivity has also been defended on the grounds that, regardless of competitive effect, it secures important public benefits, such as interline transportation, avoiding conflict with foreign governments, and insuring public benefits such as confidence in the air transportation system. Our review of the record demonstrates that none of these benefits justify indefinite retention of the exclusivity provisions.

With respect to interlining, proponents argue that current interline agreements between air carriers are dependent upon air carriers' mutual confidence in one another's agents. It is said that air carriers are only willing to accept air transportation written by another carrier's agents because the conference agreements insure that the other carrier's agents are competent.

By appointing a person outside the agency programs, a carrier cannot force other carriers to bear the financial responsibility on tickets written by its agents. The financial responsibility for a ticket is borne by the carrier whose ticket is used, no matter which or how many carriers are on the flight itinerary. 11/ The public benefits argument has a different focus: that carriers will be less willing to interline with a carrier who uses non-ATC/IATA agents because that carrier's agents will not be competent and will therefore generate ill-will by overbooking flights, misticketing passengers and generally providing poor service to the public.

The extent to which a carrier's agents can write transportation involving another carrier is controlled by interline agreements, not the passenger agency agreements. An air carrier has always had the ability to refuse to honor a ticket written by another carrier's agents through modifications in the interline agreements. We recognize, however, that existing interline agreements were entered into with the knowledge that the

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11/ An individual carrier becomes responsible for a ticket written on standard stock by the use of its validation plates.

exclusivity provisions were in place. Carriers have not, then, had an opportunity to decide whether their interline agreements should be modified to permit or deny other carriers' non-ATC/IATA agents from writing interline air transportation. For that reason, we will allow for a period of adjustment. We will continue to approve the exclusivity provisions, until December 31, 1984, to the extent that they preclude ATC and IATA carriers from authorizing nonaccredited sales outlets to write interline transportation. We shall require that carriers be free to agree between or among themselves to honor tickets written by each other's non-accredited sales for interline transportation affecting the agreeing carriers' routes. This period will afford carriers the opportunity to re-examine their interline agreements in light of our decision in this case. We encourage carriers to begin this process immediately and we are, of course, prepared to consider any changes that they submit for our approval.

It should be noted that, in the past, carriers have generally permitted other carriers to place ticket stock in corporate travel departments that write interline tickets even though they are not accredited. Similarly, one carrier relies on the qualifications of the other carrier's own employees, who also freely write interline tickets. Carriers have every incentive to maintain their own business reputations and the intercarrier agreements that are beneficial to them. Therefore, we do not anticipate any erosion of interline ticketing. In any event, interline tickets will continue to be available through conference accredited agents and, on the basis of the record, we foresee no contraction in the number or distribution of these agencies. Carriers will have a sufficient opportunity within this transition period, to modify their interline agreements give themselves added control over any non-accredited sales outlets with which their interline partners might decide to do business. Accordingly, indefinite approval of exclusivity for interline agreements cannot be justified.

Several parties have argued that any significant disapproval of the IATA agency program will be interpreted by foreign governments as a denial of fair and equal access to the U.S. air transportation market. It is suggested that this will prompt retaliatory action and that to avoid this situation, the agreements should be approved in their entirety for international comity and foreign relations grounds.

All the evidence in the record indicates that foreign governments' concern was that we would disapprove the entire IATA program and deny them common agents for the sale of their air transportation within the U.S. Eliminating exclusivity, of course, does not have that effect. The conference programs will continue to receive our approval. Moreover, foreign carriers and U.S. carriers will continue to have exactly the same marketing opportunities within the U.S. Any carrier can continue to rely on the conference programs, appoint other types of marketers or use both. Eliminating exclusivity merely gives them increased freedom in marketing their services within the United States.

Another public benefit argument for retention of exclusivity concerns public confidence in the competence of travel agents. This argument is also premised upon the notion that elimination of exclusivity will permit unqualified persons to pass themselves off as travel agents.

The assumption implicit in this argument is that any sales outlet that does not meet the present common accreditation standards will necessarily be unqualified to sell air transportation. Even if carriers choose to use unaccredited agents, it is not reasonable to expect them to deal with incompetent or dishonest marketers. Carriers will bear the immediate financial losses caused by unqualified agents as well as the long term effects of consumer ill-will. Most of the evidence parties offer to support this argument is based on events that occurred over 40 years ago when the infant airline industry lacked established distribution outlets. The dramatic change in the industry since that time was one of the primary bases for deregulating the industry. It would be incongruous to blindly accept those arguments now to foreclose competition in the distribution of the deregulated airline service. With almost 20,000 accredited agencies now available to conference members, it is unrealistic to assume that they would be compelled to use unqualified outlets to gain market access if exclusivity were eliminated.

Indeed, there is nothing in our decision that will compel carriers to deal with any agent or marketer. If carriers individually determine that dealing exclusively with accredited travel agents is the best way to market their services, because it is the most cost effective or preserves public confidence, or for some other reason, then some will not pursue alternative marketing approaches. However, the opportunity to compete is essential to the competitive functioning of the marketplace. We are not forcing changes in the marketing system. Rather, we are merely ensuring that the conditions for competition are present.

From the consumer's perspective, the argument for retention of exclusivity hinges upon the assumption that consumers will forego air travel if they have unpleasant experiences with unqualified persons. That, of course, is not what occurs today in the air transportation marketing industry or any other industry. Consumers will react to poor service by taking their business to another marketer.

Given the reputation of ATC and IATA agents, they will have an advantage over any new marketer that may enter the industry. Existing agents can differentiate themselves by highlighting their ATC and/or IATA approval. They alone will be free to identify themselves as accredited travel agents meeting industry standards. In this regard, ATC and IATA could promote the use of identifying trade names such as "travel agent" or "travel counselor" alone with an identifying symbol or trademark. In addition they could promote the fact that accredited agents assure industry representation, as opposed to offering services of one or a few carriers. Similar distinctions are made in other industries--for example, independent insurance agents. There is no reason to believe that consumers will be unable to differentiate ATC/IATA agents from other marketers. Moreover, which outlets will prosper will be determined by how well each provides its services for the public.

Finally, the eventual elimination of exclusivity will perfect the efficiencies of the existing ATC and IATA programs. We have consistently recognized that the potential for entry is an important facet of competitive performance. It affords carriers an opportunity to continuously evaluate developments in the marketplace and respond quickly to changes. It also affords new forms of marketers the opportunity to enter to meet demands they see for marketing services. Moreover, if the ATC or IATA programs are not the most cost efficient or are not serving some segments of the market effectively, those firms now dealing within the confines of the agency programs will have increased opportunities to pursue other modes of doing business.

We fully expect that travel agents will be in the forefront of any marketing innovations. If the agency agreements unduly hamper their competitiveness, they can more effectively argue for changes within the program or pursue their economic self-interest by dealing with carriers either individually or through other associations that better serve their interests.

With our phased disapproval of the exclusivity provisions, and a small number of other modifications of the programs in addition to those recommended by the administrative law judge, we conclude that the ATC and IATA passenger agency programs should be approved.

D. Antitrust Immunity

The power to confer antitrust immunity is given to regulatory agencies in order that they may protect conduct which would be considered an abuse of competitive processes in an unregulated industry from antitrust challenge. We have recognized, therefore, that full antitrust exposure is consistent with deregulation and have set a high standard for granting antitrust immunity. Antitrust immunity will not be granted unless an applicant shows that immunity is required in the public interest and the transaction will not go forward without that immunity.

Applying that policy to this case, the need for indefinite antitrust immunity has not been fully established. The public interest arguments that have been raised are founded on the view that carriers will abandon the ATC and IATA systems because of the cost of law suits. Their argument makes sense only if any accreditation program would be found to be anticompetitive. It is clear, however, that with the exception of a handful of anticompetitive provisions, the agreements are on balance procompetitive. We have no doubt that with modifications the agreements could be conformed to the standards of the antitrust laws. We therefore consider it highly unlikely that carriers will abandon the substantial benefits of common accreditation to avoid the costs of defending it against frivolous law suits.

More important, eliminating antitrust immunity will subject the air transportation marketing industry to the full force of competitive market pressures. Exposure to antitrust liability has long been recognized as a means of ensuring competitive behavior in other sectors of our economy. The reduction of our discretion under Sections 412 and 414 of the Act and the policy emphasis on competition in Section 102, by the ADA, shows that the Congress intends that air transportation be governed by the same incentives, wherever possible. Eventual elimination of antitrust immunity, therefore, appears to be most consistent with deregulation of the air transportation industry.

We recognize that the common accreditation systems have operated for almost 40 years with protection from antitrust challenge. Although this does not justify continuing antitrust immunity for the programs indefinitely, it does support a period of transitional immunity for the programs. We believe section 414 affords us some discretion to ease the transformation of the air transportation distribution industry to a competitive environment.

A gradual transition will also permit air carriers to re-evaluate the specific standards of common accreditation. Our decision identifies provisions of the agreements that might pose concern about future antitrust liability. Moreover, our conclusion that the standards relating to competence, for example, are designed to protect legitimate carrier interests, does not mean that they are perfect. Additional modifications may be required. Rather than dictate changes to the carriers, we believe it is more consistent with deregulation to allow the air carriers to re-examine the remaining rules themselves to possibly amend other provisions they believe are unduly restrictive. Moreover, they may wish to make changes in the programs they feel are desirable. To provide them time to undertake these tasks, we are conferring antitrust immunity on the passenger agency programs until December 31, 1984.

We will, consistent with past decisions where we have eliminated antitrust immunity, monitor changes in the conference programs over the next two years. Should important needs or future events come to our attention that indicate that further consideration of the immunity issue is warranted, we will, of course, give it. We invite interested persons to bring new matters to our attention before the end of 1984.

E. ASP and Cargo

Our review of the ATC agreements establishing the Area Settlement Plan and IATA agreements establishing a system for the common accreditation of cargo agents reveals that those programs present very few competitive problems. ATC contends that any person wishing to participate in the ASP who is willing to abide by its rules and meet security standards is provided access to the plan. Given this understanding there is no basis to conclude that access will be denied unreasonably. The ASP involves a cooperative agreement among airlines to integrate the process of settling accounts with accredited travel agents. Its benefits are even greater than those of the common accreditation programs. It substantially reduces settlement costs to carriers and agents, which benefits are passed on to the public. Consistent with our decision on the passenger agency systems, antitrust immunity for ASP will end December 31, 1984. We will, of course, consider the issue further if circumstances change as discussed above.

The IATA cargo agent program includes exclusivity provisions comparable to those we have disapproved in the IATA and ATC passenger agency programs. We will disapprove those restrictions. The cargo marketing industry is, on the whole, very competitive and can readily be adjusted to the new environment. Consistent with our decision on the passenger agency systems, antitrust immunity for cargo will end on December 31, 1984. We will of course, consider the issue further if circumstances as discussed above.

Having completed our summary of our decision, we now turn to the task of reviewing the conference agreements. We will first examine the ATC and IATA agreements establishing passenger agency systems. They are very similar and are best examined together. The ATC agreements establishing the Standard Ticket and Area Settlement Plan, and the IATA agreements establishing the cargo agency system will be examined separately.

HISTORY OF THE PROGRAMS

Prior to the development of the travel agent programs, the airlines individually controlled the outlets that could distribute their tickets to the general public. In the infant days of scheduled air transportation, many carriers gave their tickets to hotel porters, bell captains, taxi drivers and other persons with day-to-day contact with travelers to sell their service.[12] The use of such persons created a number of problems. Passengers were frequently misinformed on available services and fares and, at times, defrauded by unscrupulous sellers.[13]

The original ATC agreements did not, so much, establish a system of common agents as establish a single screening body that member air carriers would use in selecting their agents.[14] ATC screened agent applicants, sponsored by an airline, to ensure that they were qualified. No specific standards for accreditation were contained in the agreement. If an applicant was approved by a majority of the committee, the person was an agent for the sponsoring carrier. Other carriers were then free, individually, to decide to appoint the new agent. This system was exclusive. That is, air carriers could not use non-approved agents.

12/ ATC-T-1 at 4-5; ATC-IR-1 at 2-3; and Buchanan (ATC) 37 Tr. 17-18.

13/ See *ATC Agency Resolution Investigation*, 29 CAB 258, 288 (1959) and ATC Memorandum dated June 9, 1943 *in re* Agreements CAB 182-B and C.

14/ "[T]he resolution established that the machinery whereby persons who had been previously appointed by individual airline members of ATC could have such individual appointment reviewed by the ATC Agency Committee to determine their eligibility for inclusion on the 'Agency Control List', and therefore their eligibility for appointment for all airlines. Any person who wished to become a travel agent submitted his application through a sponsoring ATC member for consideration by the ATC Agency Committee. Other than the airline sponsorship, there were no standards for agency accreditation." ATC-T-1 at 6.

Although adopted and approved in 1940, the ATC program could not be implemented because of the Second World War. [15] In 1945 the agreements were revised and resubmitted to the Board. These agreements provided the first real standards for accreditation. They provided that a prospective agent must be acceptable for bonding and not have a reputation for unethical business practices. A short time later, ATC adopted provisions requiring that a need for a new agency location be shown. These agreements were also approved. [16]

The IATA passenger agency system was based upon the ATC model. [17] First approved by the Board in 1948, [18] the IATA program was an effort by foreign air carriers to establish standards for persons selling international air transportation in the United States. Over the years, the programs have remained very similar. Changes in one conference program are frequently duplicated in the other with a short time lag. The similarity of the programs has resulted in a virtual identity in the agents used. Almost all persons who become accredited by ATC obtain IATA accreditation shortly thereafter, or vice-versa. [19]

Over the years, the ATC and IATA passenger agency agreements have gone through a large number of changes. One of the most important was the Board disapproval, in 1959, of the ATC provisions requiring that a need for a new agency application be shown and the provision requiring an applicant to have a carrier sponsor. [20] The effect of those disapprovals was to give ATC a far larger role in the approval of agency locations. It assumed the independent responsibility to screen prospective applicants, with the power to accredit them. Carriers then decided whether to appoint the agents ATC indicated had met its standards. The 1959 decision also prompted adoption of objective qualification standards which are the basis for the financial and personnel standards in existence today. [21]

Not only have the standards changed over time, so has the travel agents' role in selling air transportation. Historically, travel agents were viewed as promoters of air transportation. Air carriers saw their role as generating traffic, i.e., inducing persons to travel who would not otherwise fly. [22] Airlines attempted to retain for themselves the nondiscretionary sales, that is persons who had to fly and simply needed ticketing and reservations services. While air carriers could not deny travel agents all such sales, a number of restrictions were incorporated into the ATC and IATA agreements to deny travel agents access to nondiscretionary travelers.

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[15] ATC-T-1 at 6-8, Order No. 983, April 18, 1941.
[16] Order E-5685, September 9, 1951.
[17] IATA-IR-1 at 7.
[18] Order 1315, March 22, 1948.
[19] It has been stated that no more than 500 IATA agent locations are not accredited by ATC. Saunders (ATC) 4 Tr. 194. Only two percent of the agents responding to the Harris survey were only accredited by ATC. ATC-IR-905 at 152.
[20] ATC Agency Resolution Investigation, 29 CAB 258 (1959).
[21] ATC-T-1 at 9.

For example, ATC and IATA forbade the location of travel agencies at airports, or in hotel lobbies. Air carriers believed that persons who agents would serve there would already have made travel plans.

Over time, many of the restrictions based on this perception of the travel agent's role have been removed. For example, in 1965, ATC attempted to prohibit agents from establishing branch offices on the premises of commercial customers ("inplant" locations). We disapproved the agreement on the grounds that preserving commercial business for the airlines was not a sufficient reason for denying commercial customers the convenience and other benefits of in-plant facilities and agents the economic advantage of assuming this activity. We determined that carriers' legitimate concerns about rebating and the value of inplant services could be met by less restrictive measures, such as restricting the compensation of in-plant customers for facilities and providing for lower commission levels. [23] Our decision facilitated the increased use of travel agents to provide ticketing and reservations services to business travelers. More recently, air carriers voluntarily eliminated a provision that precluded the payment of commissions on tickets purchased under the Universal Air Travel Plan (UATP), which is essentially a credit card for frequent, usually business travelers. [24] As a result of these and other changes, travel agents have been serving the business traveler--the pre-eminent "nondiscretionary traveler"--in ever increasing numbers. In 1978 at least half of all their sales were to persons traveling on business or for business and pleasure. [25]

There have been a number of other major changes in the programs, such as the introduction of the Travel Agent Commissioner program in 1977. [26] It is through the process of repeated amendment that we have the program in place today.

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[22] Buchanan (ATC)36 Tr. 88-90. See also 29 CAB at 286-87.

[23] Order E-21726, January 27, 1965 at 4.

[24] Buchanan (ATC) 37 Tr. 183-84.

[25] ATC-17 at 3-4. Sales to commercial accounts accounted for 40% of agents' sales in 1978. That figure has risen continuously from 1970 when it was 28%. Id. at 5. See also, ASTA-IR-24 at 83. For a discussion of the characteristics of business travel, see Buchanan (ATC) 36 Tr. 140-42.

[26] That program provides for the review and disposition of disputes between ATC and travel agent applicants or agents before an impartial and independent Travel Agent Commissioner. Agents and applicants are free to request arbitration of Commissioner decisions. Approved by Order 76-5-57, May 14, 1976. IATA adopted a similar agreement in 1980. Approved by Order 80-7-112, July 7, 1980.

The existing ATC travel agent program is, for the most part, contained in Resolution 90.3. That resolution was the result of the consolidation and simplification of Resolutions 90.1. and 90.2 that previously governed the ATC program. We approved 90.3, pending a final decision in this case, by Order 80-9-161. It went into effect on August 12, 1981. Most of the IATA travel agency program appears in Resolution 802. It too is the product of amendment and simplification of the previously effective resolution. We granted it interim approval by Order 80-6-107.

THE ROLE OF TRAVEL AGENTS IN MARKETING AIR TRANSPORTATION

Travel agent outlets are the core of the air transportation distribution system. Except for direct carrier sales outlets, and a limited number of special ticketing services for persons who ticket their own transportation, carriers rely on travel agents to sell their services to the public. 27/ At the present time there are approximately 20,000 travel agent locations throughout the United States. 28/

Under the Small Business Administration definition, most travel agents are small businesses. The SBA defines a small business to be one with

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27/ Most airline ticket offices are located at the airports a carrier serves (ATO's), or in downtown offices in large cities (CTO's). There are a few Scheduled Airline Ticket Offices (SATO's) located on government premises, such as military bases. Carriers also have attempted to make it easier for some persons, usually corporations, to do their own ticketing. In this category are the following: (a) Flite cheks--a form of self ticketing in which a book of 20 documents are issued to an account. Flite cheks are used in lieu of tickets by the customer who books a flight, fills in the flight number on the document, and presents it at the airport. The customer is billed monthly. JRC (EA)-IR-31 at 9; (b) Placement of ticket stock with commercial accounts--a number of carriers give their ticket stock to large corporate purchasers. A corporate employee calls for a reservation and then prepares the ticket, if the corporation does not have automated equipment. Tickets are completed by machines if a corporation has automated equipment. The customer is billed periodically. JRC(EA)-IR-31 at 5-9 and JRC (DL)-IR-31 at 1; and (c) Tickets by mail--the customer makes a reservation by phone and is mailed a prepared ticket and billed. JRC(TW)-IR-31. Another recent phenomenon is the use of contract bulk fares, where a contractor buys blocks of seats from a carrier at a discount and resells them to the public. To date these have played a minor role in marketing air transportation and have been used primarily in vacation markets and are often with vacation packages. Travel agents often ultimately sell individual seats earning a commission from the contractor. See, AA-12&13, UA-IR-60, OZ-CBF-1, and AF-100.

28/ As of October 31, 1981, there were 18,816 ATC accredited agency locations. ATC-T-1 at 53, ATC H-18 at 2. Generally the number of locations has been increasing at a rate of 10 percent per year. See I.D. at 40 n.2 and Appendix C Table 1. The number of IATA locations has also been projected to be over 20,000. Ruggiero (IATA) 57 Tr. 110. See also, IATA-IR-2 at 3.

under two million dollars in annual sales. 29/ The evidence we have indicates that about 74% of travel agents have sales volumes of less than $2 million. 30/ A large portion, 46%, of travel agencies are owned by women, and a significant number, 11%, by minorities. 31/

Travel agents have assumed the primary role in the sale and promotion of air travel. 32/ They provide ticketing and reservations services, frequently provide travel counseling on the best fares and services, and often promote air transportation sales through advertising and other means. Travel agents will usually sell other transportation services as well, including cruises, rail and bus transportation, and car rentals, plus travel related services such as hotels. They also sell travel packages in the form of tours and charters. Other services may include making arrangements for passports and visas, delivering tickets, providing travelers checks and providing travel insurance. 33/

Travel agents are not required, however, to perform most of these services. In fact, a significant number of agents concentrate on performing ticketing and reservations services for corporations. 34/ Moreover, virtually all agents now have commercial accounts 35/ and, as noted previously, sales to business travelers now account for about half of all travel agent sales.

The travel agent industry is experiencing a remarkable period of growth. The number of agencies has been increasing at the rate of about ten percent a year throughout the 1970's regardless of economic conditions. 36/ This should be compared to the entry rate in other U.S. industries which has varied between .6%, during periods of economic downturn, to 4.7% in periods of economic recovery. 37/ Moreover, the failure rate of firms in the travel agency industry is extremely low. The

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29/ 13 CFR 121.3-81e (1982).

30/ ATC-POA-1 at 1. This is consistent with a recent study of the travel agent industry which reports that 72% of travel agents do less than $2 million in sales. Travel Weekly, Harris Survey at 26, May 1982.

31/ ATC-POA-1 at 1.

32/ Malin (USAir) 10 Tr. 14; Buchanan (ATC) 36 Tr. 88; Palm (Republic) 52 Tr. 69, 84. See Appendix B.

33/ ATC-IR-900, 905 36 Tr. 88; ATC-T-1, p. 19; I.D. at 41.

34/ See Buchanan (ATC) 37 Tr. 128, Saunders (ATC) 44 Tr. 45.

35/ ATC-17 at 5, which states that in 1978 89% of U.S. travel agencies had corporate accounts.

36/ See I.D. Appendix C, Table 1.

37/ ASTA-20 at 33-34. See also ATC-T-1 at 34-35 and I.D. at 96.

percentage of defaults and deletions from the list of accredited ATC agents is only about 3% per year.[38] The failure rate is far below that of other industries.[39]

The record does not disclose agent profitability.[40] Profitability comparisons with other industries would give some indication of whether travel agents are experiencing unusual returns. Absent such figures, we are left with the implication that travel agents as a whole are profitable enterprises because substantial numbers of persons continue to enter the industry, and few firms exit even in very difficult economic times.

The increasing importance of travel agents may be attributed to three principal causes. The first is obvious: the dollar volume of air transportation sales on which percentage commissions are based has increased significantly over the years. Between 1970 and 1980 certificated air carrier revenues increased from 9.3 billion to 36.5 billion dollars.[41] Travel agent sales of air transportation increased from, approximately, 2.95 billion to 18.1 billion.[42] The second reason is that during thatperiod, our decisions disapproving agreements fixing commission rates took effect.[43] Commission rates (and airline commission costs) have increased dramatically. The average commission rate on tickets processed through the ASP went from 8.3% in 1978 to 9.6% in 1981, a 15 percent increase.[44]

38/ Between 1974 and 1979 the percentage of defaults varied from between 2.5 and 3.7 percent. I.D. Appendix C, table 6 at 2.

39/ ATC-T-1 at 34-35.

40/ The only figures available are from the 1977 Touche Ross Study, commissioned by ATC and a number of travel agent associations. That study stated agent profitability to be .48% of sales. ATC-IR-900 at Exhibit B-2. The study is of limited value because the basic domestic commission rate has increased from 7 to 10%, an increase of almost 43%, since it was conducted. The overall increase in commission rates is somewhat lower because agents do, or have, received different levels of commission for in-plant sales, international transportation sales and tour or promotional sales.

41/ *See* Appendix C.

42/ The former figure is from ATC-17 at 4, the latter from ATC-18 at 2a.

43/ Order 78-8-87, August 17, 1978 and 80-2-33, February 5, 1980.

44/ *See* Appendix D. The 11% figure understates the increase in revenues to the average agent. For example, the dollar amount of commissions paid per agency location through the ASP increased almost 30% between 1978 and 1980. *See* ATC-18 at 1-2a.

Finally, with the deregulation of the airlines, fares have become much more complex and carriers enter and exit markets much more frequently. Accurate information on fares and services has become much more difficult to obtain. Consequently, travel agents are selling a greater proportion of all air transportation sales. Sales through air carriers' own sales outlets are decreasing on a percentage basis. 45/ In short, there has been a tremendous expansion in the need for travel agent services.

It should be noted that a significant portion of this new demand is coming from nondiscretionary travelers. Agent sales to nondiscretionary travelers, particularly to commercial accounts, are increasing at a faster rate than to discretionary travelers. 46/ Agents are capturing corporate accounts that previously dealt directly with the airlines and air carriers are paying commissions on sales previously handled directly. 47/

In recent years, then, there has been a period of incredible growth in the air transportation marketing industry. It has, of course, also been a period of tremendous change for air carriers as well. They have only begun to utilize the substantial freedoms granted them under the Airline Deregulation Act. The health of the travel agency industry must, in large part, be attributed to the increasing demand for agents' marketing services by both air carriers and the traveling public during this period.

HOW THE PASSENGER AGENCY PROGRAMS FUNCTION

Common accreditation, as we use the term, involves the use of agreements by competing air carriers to govern the selection and retention of common agents for the sale of air transportation services. The use of agents, rather than independent retailing outlets is, in significant measure, tied to the unusual character of scheduled air transportation. Unlike the sale of goods, air carriers retain responsibility for providing the services the retailer sells on their behalf. Moreover, the carrier is responsible for paying denied boarding compensation, assuming baggage liability, and so forth. 48/ As a result, the agency system appears more conducive to retention of such control than a system of truly independent sales outlets.

45/ Travel agent domestic sales as a percentage of total domestic sales increased from 38.4% in 1977 to 53% in 1979. I.D. Appendix C table 2 at 1.
46/ Between 1976 and 1978 travel agent sales to persons traveling on business increased 41%, while their sales to persons traveling for personal reasons or for pleasure increased 30%. See ATC-17 at 3.
47/ NPTA-T-1 at 26, 27 and Table 4.
48/ See BA-T-1 at 6-7..

To become an agent, a person must apply to ATC or IATA. [49] The conferences will then examine the application to determine if it complies with their standards. ATC resolutions require applications to be processed in no more than 90 days, but most are approved or disapproved within 45 days. [50] IATA requires that applications be processed within 60 days. [51] Most of ATC's and IATA's accreditation standards fall into the categories of financial, honesty, personnel or competency, and locations requirements.

The financial requirements for ATC accreditation and retention on the agency list involve initially obtaining a performance bond of $10,000, subject to periodic adjustment based on sales volume up to a maximum of $50,000. If they are a department of a bank or have a net worth of at least $75,000 and a good credit rating, they need not adjust the bond penalty above the $10,000 minimum. After one year the agent may substitute a letter of credit for the bond. [52] In addition, there is pending in this proceeding a proposal to require applicants and certain agents to execute a personal guarantee of performance.

Financial standards for IATA accreditation differ significantly from ATC standards. Applicants must have working capital (the difference between current assets and liabilities) in the amount of $15,000 or, if the applicant is a corporation, the investment of the principals of the agency must not be less than $20,000 in the form of common stock or capital paid in surplus. [53] There is no bond requirement.

ATC's and IATA's "honesty" qualifications are quite similar. Basically, they preclude accreditation if there is a false statement in an application (ATC and IATA), the applicant is a convicted felon (ATC) or has been found guilty of willful violations of fiduciary obligations to the public or to airlines (IATA), has been adjudicated bankrupt (ATC) or has had a previous license suspended (ATC and IATA). The administrator may determine, however, after investigation, that the applicant can be relied upon to adhere to the terms of the agreement. [54]

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[49] In response to inquiries ATC and IATA send letters explaining their standards in some detail. *See* ATC-H-3 and IATA-H-4. Only half of the number of persons making inquiries pursue the application process. Buchanan (ATC) 39 Tr. 15-17.

[50] ATC Resolution 90.3 §V.E. Buchanan (ATC) 38 Tr. 56-57. ATC resolutions at issue in this proceeding may be found at ATC-IR-201.

[51] IATA Resolution 802 §D(2)(f). IATA resolutions at issue in this proceeding may be found at IATA-H-3.

[52] ATC Resolution 90.3 §IV.C.

[53] IATA Resolution 802 §C(2).

[54] ATC Resolution 90.3 §IV.D.1., and 2. and IATA Resolution 802 §C(9), (10) and (15).

The ATC and IATA personnel experience requirements are divided into two parts. One part relates to the manager of the location, and the other to the person who will perform the technical, day-to-day duties such as ticketing. The manager must meet the following standards: (1) be employed for at least 35 hours per week at the agency location (ATC) or employed full-time (IATA); (2) exercise daily supervision and responsibility at the location (ATC); (3) demonstrate knowledge of the Travel Agents Handbook (ATC and IATA); and (4) have two year's experience as a travel counselor or manager (ATC and IATA). [55]

The technical experience requirements, which may be met by either the manager or any other employee of the agent, are: (1) the person must be a full-time employee staffing the location (ATC and IATA); (2) the person must have had at least one year's experience in airline passenger ticketing at an ATC carrier or a travel agent accredited by ATC or IATA (ATC) or one year's experience in an approved office or any airline office (IATA); and (3) the ticketing experience must have been obtained in the past three years (ATC and IATA). [56]

There are five standards applicable to a travel agent location: (1) it must be advertised, identified, and represented as an office for the sale of air transportation and related services (ATC) or identified as a travel agency (IATA); (2) it must be open and freely accessible to the general public for the promotion and sale of general travel services (ATC) or the sale of international air transportation (IATA); (3) it must be open for business on a regular schedule and no less than 35 hours a week (ATC) or in accordance with local business practices (IATA); (4) it must have facilities and arrangements for security of tickets and validation plates (ATC and IATA); and (5) it must be engaged solely in the promotion and sale of passenger transportation and general travel services (ATC). [57]

Each travel agent establishes a location which he wishes to be his central place of doing business. If the agent wishes to expand his operation to other locations, he is free to do so, provided the other locations meet the standards and are approved by the conferences. He can only do business at locations listed on the list of approved locations. In order to obtain accreditation of a branch location, the home office and branch must be the same legal entity, and the home office must have full legal and financial reponsibility for the branch office. One bond covers the home office and additional authorized agency locations under the ATC rules. IATA requires an additional $5000 in capital for each branch. [58]

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[55] ATC Resolution 90.3 §IV.B.1, 2. and 3. and IATA Resolution 802 §C(3).
[56] ATC Res 90.3 §IV.B.4. and IATA Resolution 802 §C(4).
[57] ATC Resolution 90.3 §IV.A. 1., 3., 4., 5., and 6. and IATA Resolution 802 §C(5) and (12).
[58] ATC Resolution 90.3 §V.B.3. and IATA Resolution 802 §C(2)(a).

Under ATC rules, agencies located on customer premises--in-plant locations--must also be branch offices of an already established travel agency. However, an in-plant need not be open and freely accessible to the public, or meet the personnel and location standards. A customer or its officers or employees cannot control or have a financial interest in an in-plant agent.[59] The IATA agreements have been revised to eliminate in-plants as a separate category of agency locations. Rather, all locations, including those on the premises of customers, must meet the same standards. In addition, the IATA resolutions prohibit approval of a passenger sales agency at an airport, while the ATC resolutions do not.[60]

Both the ATC and IATA agreements contain a number of other accreditation standards. Both include rules that are designed to preclude persons from becoming agents who would use a great deal of air transportation themselves. This aim is accomplished by prohibiting any person who would do more than 20% of his business with himself from becoming an agent.[61]

The ATC and IATA rules also involve a number of restrictions on the air carrier/travel agent relationship. The most notable of these precludes air carrier members from paying commissions on a ticket a travel agent writes for his own use.[62]

Upon conference accreditation an agent automatically represents all member airlines, unless an airline notifies the agent that the agent shall not represent that carrier (i.e., the airline does not "appoint" the agent).[63] ATC provides agents that will settle accounts through the ASP blank ticket stock. They receive validation plates from individual carriers.[64] Agents that will settle directly with carriers receive individual carrier stock from the carrier.

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[59] ATC Resolution 90.3 §A., C.1. and 3.

[60] IATA Resolution 802 §C(14).

[61] ATC Resolution 90.3 §IV.A.8. and IATA Resolution 802 §C(5). The rules are, however, written differently and are described in more detail in the opinion to follow.

[62] ATC Resolution 90.3 §XXI.C.8. and IATA Resolution §802 §G(7). Both conferences permit a carrier to compensate an agency when an employee purchases a ticket for his own use.

[63] ATC Resolution 90.3 §VII.B. and IATA Resolution 802 §D(4)(6). Under the IATA agreements appointment is only automatic if a member has executed a general concurrence.

[64] When the plate is used to imprint a carriers name on blank ticket stock it becomes the ticket stock of that carrier. Distribution of validation plates is a matter of corporate policy. Many carriers distribute plates to all accredited agents. Others automatically distribute their plates to all agents located in cities they serve, and to any other agent upon request. Settlement procedures are more carefully discussed below in sections of this opinion dealing with the ASP.

The ATC and IATA rules also require that carriers only appoint conference approved travel agents as their agents. 65/ As a result, agents approved by the conferences are the exclusive agents of member air carriers.

LEGAL STANDARDS

Approval of agreements among air carriers is governed by the provisions of section 412 of the Federal Aviation Act, as amended. 66/ Section 412 as it now stands, is the product of extensive amendments made to its predecessor section by the Airline Deregulation Act of 1978. 67/ The most pertinent of those changes is the inclusion of a new, particularized antitrust standard which we must consider in addition to a public interest review. 68/

65/ Only agents whose names appear on an accredited agents list may be used. These provisions are dealt with in more detail in the following sections of this opinion.

66/ 72 Stat. 770, as amended by 92 Stat. 1729, 94 Stat. 39, 49 U.S.C. §1382.

67/ 72 Stat. 770, as amended by 92 Stat. 1731, 94 Stat. 47, 49 U.S.C. §1384.

68/ The pertinent portion of §412 reads as follows:

> "(2)(A) The Board shall by order disapprove any contract, agreement, or request filed pursuant to paragraph (1) of this subsection, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this Act, and shall by order approve any contract, agreement, or request, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act, except that-
>
> > (i) the Board may not approve or, after periodic review, continue its approval of any such contract, agreement or request, or any modification or cancellation thereof, which substantially reduces or eliminates competition, unless it finds that the contract, agreement or request is necessary to meet a serious transportation need or to secure important public benefits including international comity or foreign policy considerations and it does not find that such need can be met or such benefits can be secured by reasonably available alternative means having materially less anticompetitive effects;
>
> * * * *
>
> (B) In any proceeding before the Board involving the application of the standards set forth in subparagraph (A)(i) of this paragraph, the party opposing the proposed contract, agreement, or request shall have the burden of proving the reduction or elimination of competition, and the availability of alternative means having less anticompetitive effects, and the party defending the proposed contract, agreement, or request shall have the burden of proving transportation need or public benefits.
>
> (C) The findings required by subparagraph (A)(i) of this paragraph, shall be included in any order of the Board approving or disapproving any contract or agreement, or any memorandum of any contract or agreement, of any modification or cancellation thereof, or any request.

Litigation in this case has focused upon the competitive effects test of section 412. While the agreements at issue could be scrutinized under the public interest standard, no one appears to be arguing we could confine our analysis solely to this pre-ADA standard. 69/ There is apparently a consensus among the parties that our inquiry should concentrate on the effect these agreements have on competition. That is, in fact, what we have done in analyzing merger cases under section 408, which is very similar to section 412. Such an inquiry is clearly consistent with the intent of Congress. 70/

Section 412 requires a three part analysis that the Board must undertake in reviewing agreements. The competition test of §412 requires (1) an assessment of the agreements' possible harm to competition; (2) if the harm is substantial, the agreement can nevertheless be approved if necessary to obtain important public benefits or significant transportation needs, provided that (3) the benefits or transportation needs could not be served by reasonably available alternatives having materially less anticompetitive effects.

Our first inquiry will be much the same analysis as a court would undertake under §1 of the Sherman Act. 71/ Only competition will be considered. We will weigh an agreement's procompetitive effects against any anticompetitive effects. 72/ We can, therefore, use judicial precedent on Section 1 of the Sherman Act as a guide for determining if an agreement results in a substantial loss of competition. 73/ Any public benefits an agreement may secure, or transportation needs it may serve, which could not be considered by a court under section 1, will be considered in the second stage of our analysis. 74/

69/ The parameters of the public interest test are set out in Orders 79-12-163/164/165 at 58-60.

70/ See S. Rep. 95-631, 95th Cong. 2d Sess. February 6, 1978 at 248-249. H.R. Rep. 95-1779 95th Cong. 2d Sess. October 12, 1978 at 76-77 October 12, 1978.

71/ 15 U.S.C. §1. That statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

72/ Courts only consider effects on competition and not asserted benefits not directly related to competition in determining if competition has been inhibited. National Society of Professional Engineers v. U.S., 435 U.S. 679, 690 (1978).

73/ We adopted this approach in agreements cases in Order 80-4-113, April 15, 1980 at 8-9.

74/ Section 412 requires that we consider benefits or transportation needs. Such factors could not be considered in a case brought under the Sherman Act. See e.g., U.S. v. National Association of Broadcasters, 536 F.Supp. 149, 166-67, (D.C.D.C. 1982).

Our approach is consistent with Congress' directive that we rely on competition to the greatest extent possible. 75/ The policy directive of the ADA establishes a clear presumption that competition can be relied on to serve the public interest. The same presumption--that market forces will optimize service and price options--operates in other industries.

Reliance on the marketplace as the means to optimize public interest is a well-established principle of U.S. antitrust law:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestricted interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." Northern Pacific Railway Co. v. U.S., 356 U.S. 1, 4 (1958).

To the same effect is the recent Supreme Court case of National Society of Professional Engineers v. U.S., 435 U.S. 679, 695 (1978).

> "The Sherman Act reflects a legislative judgement that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' Standard Oil Co. v. FTC, 340 U.S. 231, 248, 71 S.Ct. 240, 249, 95 L.Ed. 239. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain--quality, service, safety, and durability--and not just the immediate costs are favorably affected by the free opportunity to select among alternative offers."

Deregulation has always required a measure of faith that competition will produce the best outcome. 76/ That is no less true in this case.

75/ Subsection 9 of Section 102 of the Act states Congress' direction to rely on competition. It provides that the public interest includes "[t]he encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality and price of air transportation services." 49 U.S.C. §1302. See also H.R. Rep. 95-779 and n.70 supra at 55, October 12, 1978, and S. Rep. 95-613, n.70 supra at 249.

76/ See e.g., Orders 79-12-163/164/165, October 24, 1979; 80-6-1/2, March 31, 1980; and 80-10-66, August 14, 1981.

Section 412 also provides that opponents of an agreement have the burden of presenting evidence that it is anticompetitive. Proponents must present evidence on public benefits; opponents bear the burden of producing evidence on materially less anticompetitive alternatives.

IATA asserts that only "real", "hard" facts showing harm to competition satisfy the initial obligation of proof. In its view, an agreement cannot be disapproved on the basis of policy considerations or argument concerning an agreement's competitive effects. They would require that opponents of the agreements present direct evidence of exclusion and quantify the impact of their exclusion. [77] IATA suggests this is the only reasonable interpretation of the burden of proof provision of §412.

IATA acknowledges that such direct evidence probably is not necessary if an agreement is a blatant--*per se*--violation of the antitrust laws. It insists, however, that none of the agreements have these effects, consequently empirical evidence is required.

BDA and DOJ maintain that they do not have to show "actual measurable harm", to meet their burden. In their view, any agreement can be anticompetitive as a matter of law. [78]

Opponents need not present specific facts demonstrating or quantifying the precise reduction in competition. We have consistently held, and reaffirm that holding here, that parties may rely on economic testimony as well as established antitrust principles to carry their burden of proof. [79] Quantification of the effects of an agreement that restrains the operation of the competitive marketplace need not be offered.

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[77] IATA cites a number of cases for the proposition that a finding of anticompetitive effects based on theory could not be sustained. IATA Brief to the Board at 23-24. IATA fails to recognize, however, that courts are increasingly striking down agreements using a truncated rule of reason analysis. They are being found unlawful on the theory that an examination of an agreement can reveal restraints that are unreasonable on their face. *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1369-70 (5th Cir. 1980) and *U.S. v. Columbia Pictures, Inc.*, 507 F.Supp. 412, 432 (S.D. Cir. 1980). In addition all cases involved were private suits seeking treble damages under section 4 of the Clayton Act, 15 U.S.C. With one exception, the court required this proof not to establish the existance of a violation of the antitrust laws, but to establish a causal connection between the alleged violation and the plaintiff's alleged injuries. The one exception was *Hommel v. Ferro Corp.*, 659 F.2d 340 (3rd Cir. 1981). In that case the court was reviewing a plaintiff's allegation of price discrimination by a single competitor over a discrete period of time. Here we are dealing with virtually industry-wide agreements which have been in affect for almost 40 years. The courts, when faced with a practice that has been in effect over a long period of time, covering a substantial portion of the industry, have recognized that inferences of anticompetitive effect of an agreement may be drawn from its nature and scope.

[78] BDA cites Orders 80-6-66 at 10 and 79-11-18 at 5.

[79] IATA Show Cause Proceeding, Order 80-4-113, April 15, 1980 at 30 and Agreements concerning Intrastate Carrier Participation in the ASP, Order 79-11-18, November 1, 1979 at 5.

Courts have established that certain kinds of restraints that go to the heart of competitive behavior should be condemned without proof of whether they are effective in actually restraining competition. However, the opponents of the agreements do not rely solely on this antitrust theory of per se illegality. Rather, they also rely on evidence of the market dominance of the agreement participants and evidence that various provisions have been applied in a way that limits competition. If these predicates are established, detailed quantification is not required by courts in such situations because the anticompetitive effect is readily apparent. 80/

ASTA argues that we are obligated, under section 412, to balance the procompetitive and anticompetitive effects of the agreement as a whole in determining whether they substantially reduce competition. In its view, we cannot disapprove specific provisions of the agreements as anticompetitive.

This contention is not supportable under our §412 precedent or antitrust case law. As our discussion of the history of these agreements suggests, we have customarily analyzed the effects of individual restraints and have frequently disapproved portions of agreements submitted for our approval. 81/ Moreover, courts are seldom confronted with comprehensive agreements. Rather, parties usually challenge individual provisions that courts examine under Rule of Reason analysis to determine whether particular restraints unreasonably restrict competition. Courts look at the relationship of the individual provisions to any efficiencies produced by coordinated activity. Where they find efficiencies, individual restraints must be necessary to obtain them and not place a greater restraint on competition than is necessary to achieve those benefits. 82/

80/ See pages 40-43, infra. The facial unreasonableness theory is a reasonable corollary to per se treatment of agreements. It is founded on the view that a full-blown inquiry into the effects of some agreements is unnecessary because, once market power is proved, a substantial adverse effect on competition is unavoidable. See Sullivan, Antitrust 255, 256 (1977).

81/ Pan American-National Agreements, 28 CAB 960, 963 (1955); ATC Agency Resolution Investigation, 29 CAB 258, 266 (1959) affirmed sub nom McManus v. CAB, 286 F.2d 414 (2nd Cir. 1961), and Order 80-6-66, June 12, 1980. There is also a measure of inconsistency in ASTA's position. While it maintains we must reach a single conclusion on the agreements, it asks us to disapprove two specific provisions: towit, the IATA airport restriction and personal guarantee provisions. ASTA Brief to Board at 3 p. 7.

82/ U.S. Trotting Ass'n v. Chicago Downs Ass'n Inc., 665 F.2d 781, 790 (7th Cir. 1981); Realty Multi-List v. U.S., 629 F.2d 1351, 1372 (5th Cir. 1980); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978).

This approach clearly best serves the public welfare. It precludes the use of efficiency producing agreements as shields for conduct that contravenes the antitrust laws. [83]

With the passage of the Airline Deregulation Act, section 412 analysis must be viewed in light of the Sherman Act. That statute provides ample guidance on the types of agreements we should approve in the airline industry. While §412 provides us with discretion to look beyond the confines of the Sherman Act, it is clear that Congress intended that we exercise that discretion sparingly. Our concern should be, and is, primarily on the competitive effects of the agreements before us.

METHOD OF ANALYSIS

When we instituted this case, we viewed the conference agreements as representing a substantial departure from the competitive mode. In contrast to the distribution systems of other industries in which sales are predominantly through independent entrepreneurs, the air transportation marketing system is dominated by agents appointed pursuant to cooperative agreements. We initially suggested these agreements therefore may violate the antitrust laws. [84] As we have just outlined, we believe that the proper analysis under section 412 should focus on the individual aspects of the agreements. In this section, we will more closely examine the relevant antitrust principles which will govern our review of the agency programs.

As was recognized very early in the development of judicial case law under the Sherman Act, every contract or agreement concerning trade will restrain competition in some way. Restraining trade is the essence of contracts. [85] Obviously, not all contracts are illegal. Courts have interpreted the Sherman Act to ban agreements which are adopted for the purpose of reducing competition, or which have a significant tendency to reduce competition. Contracts that only incidently restrain competition are permissible. [86]

83/ This reasoning underlies the Supreme Court's decision in Arizona v. Maricopa County Medical Society, ___ U.S. ___, 102 S.Ct 2466 (1982), where the court struck down illegal price fixing provisions of agreements tied to a program intended to provide a community with an alternative health insurance plan. Antitrust commentors agree with this approach. Bork, The Antitrust Paradox, 335-337 (1978) and Sullivan, Antitrust ¶88 (1977). In fact, ASTA acknowledges this approach is the correct one in agreements cases. See ASTA Brief to Board at 25-26 and 39, citing Antitrust Advisor (2d ed., Supp. Liebler ed. 1981) at 30-31.

84/ Order 79-9-65 at 2-3 and 14-15. See also Order 70-12-165 at 14-15, ATC Agency Investigation, 29 CAB at 265.

85/ Chicago Board of Trade V. U.S., 246 U.S. 231, 238 (1918).

86/ Id. See Sullivan, Antitrust §63 (1977).

Courts reviewing agreements under the Sherman Act will not find agreements designed to increase efficiencies, and tailored to achieve such purposes, to be violations of the antitrust laws. Economic efficiency and competition are interrelated. Competition spurs competitors to make their production and distribution of goods or services more efficient. Competitive pressures induce firms to expand to the scale where they are most efficient and to eliminate economic waste. [87] Cooperative arrangements whose purpose and effect is to produce efficiencies can enhance competition.

Where an agreement has a mixture of competitive effects, courts will usually consider the agreement under the Rule of Reason doctrine, to determine whether conduct is significantly and unreasonably anticompetitive in character or effect. [88] Courts will consider all facts relevant in determining effects on competition, including the businesses involved, the nature of the restraint and its actual or probable effect and the purpose sought to be achieved. [89]

Courts in examining the competitive effects under the rule of reason will define a relevant market in which competitive effects are to be considered. They will not go through the vigorous definition of markets undertaken in monopolization or merger cases, but undertake a streamlined analysis establishing the parameters of competition affected. [90]

ASTA argues, and we agree, that the relevant market in considering these agreements is passenger air transportation in the U.S. They state that we must focus on the extent to which these agreements affect the price and supply of such services. If the impact of an agreement is to lower prices or increase supply, the public may be benefited by them.

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[87] Sullivan, *Antitrust* §59 (1977).

[88] Some types of agreements have such a pernicious effect on competition that courts will strike them down, regardless of the existence of alleged efficiencies. *Arizona v. Maricopa County Medical Society*, ___ U.S. ___, 102 S.Ct. 2466, 2477 (1982), *citing U.S. v. Socony-Vacumm Oil Co.*, 310 U.S. 150, 224 n. 59 (1940).

[89] *Chicago Board of Trade v. U.S.*, 246 U.S. 231, 238 (1918).

[90] *See e.g.*, *Optivision v. Syracuse Shopping Center Associates*, 472 F.Supp. 665 (S.D.N.Y. 1979) and *Brown v. Indianapolis Board of Realtors*, 1977-1 Trade Cases ¶61,435 (S.D.Ind. 1977) The question is not whether participants have a monopoly in the relevant market but whether participants have sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively on equal terms. *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 (5th Cir. 1980) and sources cited therein.

The market position of the parties to the agreement must also be considered. The impact of a restrictive agreement on competition will, in great measure, depend upon the number or market position of parties to the agreement. A restrictive agreement between competitors is less likely to have a significant adverse effect on competition if there are a number of other producers to whom a purchaser can turn. For this reason, not all exclusive dealing arrangements are condemned under the antitrust laws. [91] But if the agreeing producers are the major competitors, or most producers are parties to the agreements, then a restrictive agreement may effectively preclude market alternatives and have a more significant adverse effect on competition. [92] In this case, we are confronted with agreements among virtually all air carriers.

Another consideration that enters into the antitrust analysis is the nature of the restraint. Economic theory teaches that competition suffers if firms can exercise market power, which is defined as the ability to decrease output or raise prices above the competitive level. [93] Courts have consistently held that agreements that directly constrain individual firm's decisions about price and output strike at the nervous system of our economy. [94] Cooperation in these areas is conclusively presumed to be unlawful without regard to the market power of the participants. At the other extreme are cooperative activities that are carefully designed to enhance individual member's decisionmaking. For example, exchange of information about past pricing or output data or the adoption of industry standards have often been sustained as long as the purpose and effect of such practices is to enhance rather than restrain competition. [95]

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[91] Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[92] See, e.g., Standard Fashion Co. v. Mayrene-Houston Co., 258 U.S. 346 (1922) (Although requirements contracts are generally lawful, an exclusive contract to supply retailers which together constituted 40 percent of the relevant market was found unlawful because of the portion of the market foreclosed.)and U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1370 (5th Cir. 1980) (Exclusion of competitor from association with market power may create unjustified harm to broker and public).

[93] Section 7 of the Clayton Act is designed to prevent an individual firm from achieving this level of market domination through merger while section 1 of the Sherman Act focuses on contracts, combinations or conspiracies that seek to achieve this result directly or indirectly.

[94] U.S. v. National Ass'n of Broadcasters, 536 F.Supp. 149, 155 (D.C.D.C. 1982) and cases cited therein.

[95] Compare Eliason Corp. v. Natl. Sanitation Foundation, 614 F.2d 126 (9th Cir. 1980); Maple Flooring Mfrs. Ass'n v. U.S., 268 U.S. 563 (1925), with Radiant Burners, Inc. v. Peoples Gaslight and Coke Co., 364 U.S. 656 (1961); U.S. v. Container Corp. of America, 393 U.S. 333 (1969).

The relationships of the agreement participants in the chain of distribution can also influence the assessment of likely competitive effect. Agreements among direct competitors that seek to regulate competition at that level of production are referred to as horizontal restraints. 96/ Vertical relationships involve firms at different levels of production or distribution as in the case, for example, of a manufacturer and a wholesaler. While there are no clear guidelines, horizontal agreements among competitors appear to be of greater concern to antitrust courts. 97/ It has recently been suggested that vertically imposed restraints involving a single producer and its distributors do not pose significant competitive problems in the absence of market dominance. 98/ In this case, proponents of the agreements seek to characterize these agreements as solely vertical while the opponents emphasize their asserted horizontal effects. It is readily apparent that neither view is entirely descriptive of the complex relationships among air carriers and travel agents.

The agreements at issue in this case are agreements between air carriers, that is to say they are horizontal agreements. However, their effects are both horizontal and vertical. As between air carriers, they restrain competition in the ways carriers distribute their products. Because the agreements set the terms on which air carriers will deal with agents, they have vertical effects. There are also horizontal effects at the agent level of distribution. By creating rules under which travel agents must operate, competition between agents is affected, as well as competition between agents and other persons who would distribute air transportation. 99/

96/ There is a horizontal agreement when competitors agree directly or through the use of a trade association.
97/ Arizona v. Maricopa County Medical Society, __U.S.__, 102 S.Ct. 2466, 2475 n.18 (1982).
98/ See Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). In that case the court ruled that a producer could limit the territory in which distributors sold its product. While competition in the sale of that product (intrabrand competition) was reduced, that loss was outweighed by increased competition between that product and others (interbrand competition). GTE Sylvania possessed a market share of only 5 percent of national television sales. That case is of limited value here, however, because this case involves a joint decision by competitors in the air transportation industry on restrictions they will place on persons lower in the distribution chain.
99/ The fact that travel agent trade associations participate in meetings where changes to the programs are considered has led some parties to suggest that carriers may have been encouraged to adopt agreements with proscribed horizontal effects. DOJ Brief at 26-27.

Each effect on competition must be considered in determining whether an agreement substantially reduces competition. Both procompetitive and anticompetitive effects, at each level, must be considered in the balance. This task requires an extensive, fully developed evidentiary record. The parties to this proceeding and the Administrative Law Judge have provided us with such a record. [100]

As we have already suggested, the elimination of business rivalry with respect to the price or supply of air transportation is the type of effect with which we would be concerned. On the other side of the balance, we will consider the extent to which an agreement makes the market more efficient. If it does, it aids in the reduction of prices and the better allocation of resources. [101] This is the essence of the rule of reason analysis courts use in evaluating agreements under §1 of the Sherman Act and is the method of analysis we employ in this decision.

It must be emphasized, however, that the existence of pro-competitive benefits does not give competitors carte blanche to engage in coordinated activities. Courts will still void any restriction, by a combination or trade association with significant market power, if it lacks competitive justification or its reach clearly exceeds the combination's legitimate needs. [102]

COMMON ACCREDITATION

As was noted earlier, the original agreements establishing the passenger agency conferences were adopted to eliminate unqualified and dishonest persons from the air transportation marketing industry. [103] In the infant scheduled air transportation industry, it was believed that air carriers could not individually protect themselves in their agency dealings. [104] Given our regulatory responsibility to oversee the growth and development of the air transportation industry, we were willing to usurp the function of the marketplace and allow cooperative agreements to improve air transportation distribution. In essence, we concluded that the loss of competition was outweighed by the public benefits of improved competence and integrity of distribution outlets.

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[100] The existence of such an extensive record is another reason we have decided not to disapprove certain provisions on the grounds that they are *per se* illegal. All provisions will be considered under the rule of reason.

[101] *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1364 (5th Cir. 1980).

[102] *Id.* at 1370.

[103] *ATC Agency Resolution Investigation*, 29 C.A.B. 258, 288 (1959) and ATC-T-1 at 5.

[104] *Id.* This stemmed directly from the developmental nature of air transportation at the time. Carriers could not afford to establish substantial in-house distribution systems. Because of the novelty of passenger air transportation, they could not individually obtain representation by established travel agents. Carriers had turned to questionable marketers as the only economic means of distribution.

However, the original agreements were not at all comprehensive and provided for substantial carrier discretion. Thus the original agreement, Agreement CAB 182 defined agent; excluded common carriers as qualifying for agency status; and provided for approval or disapproval of agents by majority vote of the agency committee. The agreement merely provided a mechanism by which individual carriers had their agents screened by ATC. 105/

Over time, detail was added to the resolutions and our regulatory role increased. Between 1951 and 1979 the basic ATC agreement was amended over 250 times. 106/ In reviewing amendments to the programs, we began to focus upon air carriers' combined economic power. Our concern was that air carriers not abuse their economic power in their dealings with agents, especially in view of the protection from antitrust challenge afforded carriers by the then automatic conferral of antitrust immunity on agreements that we approved. 107/

By the time of the ATC Agency Resolution Investigation in 1959, we were disapproving provisions as abuses of concerted economic power. In that case we disapproved need and sponsorship provisions because they were not necessary to obtain the laudable objectives of the conference programs. 108/

105/ See ATC-9 for text of the original agreement.
106/ ATC-T-1 at 8, 13. Sponsorship was the only requirement for accreditation in the original ATC program. ATC-9 at 3. In 1945 the ability to obtain a bond and certain honesty requirements were added as standards for accreditation. ATC-T-1 at 7. The rule precluding anyone doing 20% or more of his business with himself was added in 1959. ATC-T-1 at 44. Personnel standards and the modern bond requirement were added in 1961. ATC-T-1 at 9.
107/ In 1978, section 414 was revised to give us the discretion to withhold immunity on agreements we approved. Prior to that time, section 414 provided that immunity attached automatically to any agreement upon approval under section 412. See 72 Stat. 770 for text of section 414 before amendment.
108/ 29 CAB 258, 263 "This is not a situation, therefore, where we can grant to carriers on the basis of management expertise or discretion substantial freedom to make decisions without detailed Board supervision and control. Through the ATC system the carriers hold life and death power over the travel agencies, and it is unthinkable that the carriers should exercise those powers without providing ample opportunity for appeal." Id. at 264-65.

In fact, insuring that new provisions were fair to agents became our central concern in reviewing agreements. For example, we required ATC to assure procedural fairness to agents 109/ and precluded the use of conference power to resolve disputes between individual carriers and agents. 110/ Only recently have our decisions begun to focus on the need to increase competition in air transportation marketing. Perhaps the most important revision in this area was our decision to disapprove agreements setting commission levels air carriers could pay agents. 111/ We decided in those cases that we should rely on competition to dictate the level of compensation agents would be paid for their services. 112/

While the history of our regulation of the conferences demonstrates our recognition of the possibilities for abuse of the conference systems of agents, many of those same decisions recognized that there are efficiencies to be gained from the conference system. 113/

Even though the many provisions of the ATC and IATA passenger agency systems have differing purposes and effects, we can treat the systems generically and focus upon their essential elements. We begin by recognizing that over time the role of carriers in selecting agents decreased while the responsibility of the conferences was on the rise. 114/ With the adoption of blanket authorizations, persons approved by the conferences are now treated as appointed unless a carrier affirmatively acts not to appoint it. 115/

109/ ATC By Laws Investigation, Order 75-6-49, June 5, 1975 and Orders 76-1-11, January 5, 1976 and 76-5-57, May 14, 1976.

110/ Orders 79-8-134, August 29, 1979 and 80-6-101, June 17, 1980. Similarly, by Orders 79-3-178, March 27, 1979, and 79-7-202, July 30, 1979, we required changes in ATC dishonored check rules to reduce the burden they imposed on agents' immediate cash flow.

111/ Orders 78-8-87, August 17, 1978 and 80-2-33, February 5, 1980.

112/ "In our view, overall efficiency and lower fares are more likely to result from regulatory actions that increase the carriers' options for marketing air transportation than from efforts to stifle natural competitive incentives." Order 78-8-87 at 17.

113/ "[Our] approval has been granted in order to assist the carriers, among other things, to avoid the bidding up of individual commission rates in order to secure exclusive agency arrangements; to facilitate interline ticketing and impartial routing of traffic by qualified agents acting for more than one carrier; to ease determination of credit qualifications of applicants and agents by providing a central clearinghouse for information; and to promote economy and efficiency for both agents and carriers by the use of uniform procedures for reporting, custody and remittance of revenues." ATC Agency Resolution Investigation, 29 CAB at 262-63. Emphasis added.

114/ ATC-T-1 at 14.

115/ ATC Resolution 90.3 §§V.E. and VII.B. and IATA Resolution 802 §D(4)(6). Between 20 and 30 ATC airlines provide an agent with their plates after notice of its approval. ATC-T-1 at 16-17.

The delegation of the responsibility to screen applicants, monitor their activities and take enforcement action where conference rules are violated has resulted in the virtual integration of air carrier member marketing activities, at least through agents. By commonly delegating responsibility over agent distributors to their trade associations, carriers have eliminated duplication in the creation and oversight of their agent networks. Carriers, then, can take advantage of the inherent economies of scale of a system where costs are spread over a large base. The costs are shared with all the other airlines participating in the system. This integration is what we denominate "common accreditation" or "common appointments."

The cost of this system is very low. The costs of administration of the ATC program in 1980 were $1,413,428.[116] In 1979 the cost of administration of the ATC program was about $100 per agency location.[117] The cost of administration of the IATA program in the Western Hemisphere in 1979 was only $44 per agency location.[118] The real cost of distribution, to an individual carrier, of course, is the total of all administration costs plus commission costs. Comparing the cost of airport ticket offices and city ticket offices, which generally handle primarily simple ticketing, the costs are only slightly higher.[119]

It has been argued that ATC's and IATA's role should be limited to collecting information on prospective agents. Air carriers could then make decisions based upon their individual standards. This system would certainly increase individual carrier's freedom in the appointment process. However, air carriers would have to assume the costs of reviewing the qualifications of individual agents, monitoring their agents' activities and enforcing their rules. Even the benefits of an in-place distribution system would be lost as a carrier contemplating entry into new markets would have to review information on agents in the new market. In short, without collective standards, approval, monitoring, and enforcement all efficiencies except those relating to information gathering would be lost.[120]

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[116] ATC-18 at 2A-2B.

[117] ASTA-20 at 53. *See also* I.D. Appendix C, Table 7. The cost of administration to individual carriers per agent in 1978, based on contribution to ATC did not exceed $17.43. For 13 of 32 ATC members or associate members the cost was less than $1.00 per agent.

[118] ASTA-20 at 53, IATA-IR-75 at 2. I.D. at 97 n.1.

[119] Airline CTO costs for various carriers ranged from 4.1% to 8.5%, with an average of above 6%. NPTA-T-1 at 23. *See* Wilson (Ozark) 45 Tr. 83. Although these costs are well below average commission levels, carrier ticket offices do not come close to matching the geographic scope of the agency system. No carrier has more than 243 direct sales offices and for most carriers the majority of these are located in airports. *See* generally JRC-IR-10 and AA-IR-6, RC-IR-3, ASA-IR-4 and PA-IR-12.

Air carriers probably could not establish and oversee comparable marketing systems if they were required, as a result of this case, to individually appoint agents.[121] Carriers would only do business with those agents with whom they did substantial amounts of business.[122] Thus, under a common system there are far more distribution locations, providing information on fares and services to the public. Because there are more outlets, offering information on a wider variety of fares and services, competition among air carriers is enhanced.[123]

Common accreditation also facilitates intercarrier competition by reducing the cost of entering new markets. Even in cities far removed from a carrier's existing route system, there are accredited agents prepared to provide distribution services immediately upon notification of a carrier's decision to enter. A carrier can enter a new city, or provide service in a new market without incurring sigificant costs in establishing a distribution network. Similarly, carriers can freely exit without liquidating fixed assets.[124]

Travel agents benefit, as well. Common accreditation lowers the cost of entering into the marketing industry by eliminating multiple applications to airlines for accreditation. An agent only has to send in one application, and meet one set of standards to become an agent for all the conference members. It can then offer the public a greater variety of air transportation services and spread its overhead over a much wider range of products. This increases competition, at the retail level, for consumer patronage. Since most agents sell the services of most air carriers, competition is enhanced in the sale of a single carrier's services, as well as in the sale of different carriers' services. 125/

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[120] We recognize, however, that the efficiencies of common accreditation could very well be obtained from an accreditation system operated by an independent third person, as DOJ once advocated. So long as the third person dealt with a number of carriers, accreditation costs would be spread over a wide base, without the concomitant fear that carriers would seek to restrain competition unreasonably. However, there are social and economic costs inherent in this approach and we prefer to avoid even the possibility of disrupting the air transportation distribution network, no matter how transitory this period would arguably be, unless we are persuaded that disapproval was the only way to enhance competition in airline marketing. DOJ has changed its position in its briefs to the Board and we presume that it now concurs in this assessment.

[121] See JRC(02)-T-1 at 3-4, Nesbit (Continental) 48 Tr. 88-91 and Fahy (American) 1 O.A. Tr. 196.

[122] See Blake (Eastern) 47 Tr. 81-82, RC-T-1 at 3-4. See also Nesbit (Continental) 48 Tr. 90; Palm (Republic) 52 Tr. 53; and Malin (USAir) 53 Tr. 86, for the proposition that a low percentage of agents sell the bulk of the carrier's tickets.

[123] The market is more like the perfect one where consumers have knowledge of all relevant information.

[124] Wilson (Ozark) 45 Tr. 131-32 and 46 Tr. 19-20, JRC)AL)-T-1 at 2-3.

The public is the beneficiary of common agents because they can secure better information about prices and services in the marketplace. In addition, consumers should benefit through the lowering of air carrier distribution costs. 126/

While these procompetitive effects are significant, any common accreditation system will also act to reduce competition in some ways. Uniform rules for accreditation, even within a program that is not exclusive, tend to chill individual carrier incentives to devise more efficient methods of distribution. Competition in air transportation marketing is defined by the rules of the conference programs. If passenger transportation distribution was the subject of individual carrier decisionmaking, each carrier would act in its own interests to maintain an efficient retail network to sell its services. Each would determine the kind of retailers that would meet its marketing objectives.

Our task here does not involve dealing with common accreditation concepts in the abstract. We must specifically examine the effects of the ATC and IATA programs. We find that the benefits that one would expect to result from these programs are significantly curtailed because of the existence of provisions which unnecessarily restrict competition. We do not believe, however, that the only way to address our specific concerns is to force carriers to start over, with the threat of antitrust exposure to prevent excessive restraints in a new program. Rather, with our phased removal of their exclusivity provisions and rules against dealing with certain kinds of ticket outlets, the behavior of carriers and agents participating in the ATC and IATA agreements will be subject to discipline of potential entry from other forms of marketers. In a relatively short time the standards of the programs will closely resemble those that would have developed in an unregulated environment. Market forces will, then, dictate the standards of the program. More important, the change will occur without eroding their competitive benefits.

Many of the accreditation standards now contained in the agreements would undoubtedly be retained in the same or similar form if carriers were to formulate individual standards. Standards that generally relate to personnel qualifications, financial capability, and reliability of agents and the rules governing security of standard ticket stock and reporting to the Area Settlement Plan appear to be narrowly related to legitimate business concerns about an applicant's qualifications and the efficient functioning of the ASP. To the extent that these particular standards are not unreasonable impediments to entry, interbrand competition among air carriers has been enhanced. In other words, the mere fact that carriers have imposed collective accreditation standards is not sufficient reason to disapprove the entire program of commonly accredited agents.

In fact, the primary thrust of the arguments against common accreditation is directed at provisions not directly related to the basic business qualification standards. In some areas, carriers have had a common interest, which is perhaps enforced by travel agents, to foreclose interbrand competition in the way that air transportation services are sold to the public. The exclusivity provisions are the most obvious example because air carriers agree among themselves that no airline will compete by marketing services outside of the accredited travel agent system.

EXCLUSIVITY

The principal provisions of the agreements that unnecessarily restrict marketing practices do not relate to the standards of the programs at all, but to air carriers' freedom to use other marketers. These exclusivity provisions do not themselves produce efficiencies nor are they necessary to achieve the efficiencies of common accreditation. Rather they constrain competition among airlines, between carriers and agents, and among marketing outlets. Industry-wide agreements with these objectives and effects are not tolerated under traditional antitrust policy. We have decided to disapprove them in a two step process. We will immediately disapprove the exclusivity provisions as they relate to a carrier's online ticket sales. Exclusivity, to the extent it applies to interline sales will be approved until December 31, 1984, unless individual carriers agree to allow non-accredited sales entities to write interline tickets.

A. What is Exclusivity

Both conferences have clauses in their agreements which prohibit their members from compensating non-conference approved agents for the sale of air transportation. [127] The practical effect of these provisions is to eliminate the use of other marketing outlets in the sale of air transportation. Besides direct sales outlets, there are very few persons other than accredited travel agents engaged in the sale of air transportation, and they sell only a very small portion of the scheduled air transportation sold in the U.S.

The principal nonaccredited agent marketers are bulk fare contractors. Bulk fare contractors negotiate with air carriers to purchase a portion of an aircraft's capacity at a discount price. They then resell the air transportation to the public, frequently in conjunction with hotel accommodations, tours and so forth. The benefit to the air carrier in these arrangements is that the contractors assume some portion of the risk of loss if a seat goes unsold. Air carriers believe the passing of this inventory risk is of significant value to them. However, the number of contractor arrangements that have been entered into is relatively small.

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[127] The ATC exclusivity clauses are as follows:

> An agent authorized by a member to sell domestic air transportation must operate from an authorized agency location included on the Agency list. Members will pay sales remuneration to authorized agents only. ATC Resoluton 90.3 §I.
>
> No member shall retain any person as its agent or any place of business as an authorized agency location unless such person and such location appear on the Agency list then in effect. ATC Resolution 90.3 §X.A.
>
> No commission shall be paid by or for a member to any person for the sale of domestic air passenger transportation, except: A commission paid to an Agent. ATC Resolution 90.3 §XXI.A.1.
>
> Buchanan (ATC) 36 Tr. 158-160 and 163.

The IATA exclusivity rules provide:

> [A] travel agency appointed by an IATA carrier to sell international air transportation must be an Approved Agent whose name and address have been entered on the Agency List. IATA Resolu-tion 802 §A(2).
>
> IATA carriers will pay sales agency remuneration in accordance these Rules to Approved Agents only. IATA Resolution 802 §A(3).
>
> Ruggiero (IATA) 59 Tr. 166.

It is unlikely that more than a tiny fraction of scheduled air transportation is sold in this fashion. [128]

Some scheduled air transportation is also ticketed by high volume users. Corporations frequently establish their own travel departments to ticket air transportation for company employees. While these business travel departments often use the same reservations systems agents use, and perform much the same ticketing and reservations functions that some types of agents perform, they cannot be paid commissions. [129]

A number of other forms of ticketing were suggested in the record. However, very little ticketing is done by these alternate distribution systems and virtually all are alternate forms of direct sales. [130] The record indicates, therefore, that very little ticketing is done by persons other than the air carriers themselves or conference approved agents.

The dominance of travel agents in ticketing airline services is not in itself objectionable. If this market position were achieved or persists solely because of the efficiencies of the existing distribution system vis-a-vis other options for purchasing tickets, there would be little basis for challenge under antitrust standards. However, with the exclusivity provisions in place we cannot find that this is the result of the normal operation of market forces but must instead presume that present industry-wide agreements are dictating marketing structure.

B. Exclusivity as a *Per Se* Violation.

The courts, in reviewing agreements under the Sherman Act, have concluded that some are to be conclusively presumed to be unreasonable restraints of trade simply by virtue of their obvious and necessarily adverse effect on competition. They are struck down, without regard to any alleged justification, because past experience demonstrates that their obvious purpose or effect is to significantly impede the normal operation of the marketplace. Such contracts are referred to as *per se* violations of the antitrust laws.

BDA and DOJ suggest that the exclusivity provisions have the same competitive effects as agreements the courts have treated as *per se* violations of the antitrust laws. While not advancing a *specific* legal theory, DOT also contends that it is readily apparent that exclusivity acts to reduce competition among carriers. DOJ maintains that the exclusivity provisions amount to a collective refusal to deal with certain traders in the marketplace. It interprets the agreements to have the purpose and effect of limiting competition by protecting incumbent retailers--carriers and accredited agents--from competitors and by the imposition of favorable dealing terms.[131] It compares the agreements to those in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*,[132] which it interprets to stand for the proposition that standards designed to limit competition, by excluding firms from a market to the benefit of the parties to the agreement constitute *per se* violations of the antitrust laws.

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[128] The carriers that engaged in contractor bulk fare arrangements generally do not have more than a handful of contractors. *See* sources cited at page 16 n.27, *supra*. For example, Ozark only uses *two* bulk fare contractors. Wilson (*Ozark*) 45 Tr. 107.

[129] *See* Buchanan (ATC) 36 Tr. 151-54; Wilson (Ozark) 45 Tr. 134-35. The *payment of* commissions to such persons are prohibited by the Conference agreements. ATC-IR-66 at 1. It is estimated that the BTD members of NPTA ticketed $303 million in air transportation in 1978. NPTA-T-1 at 24.

[130] *See* page 16, n.27, *supra*. I.D. at 38-39.

A group boycott, as classically defined, is "a concerted attempt by a group of competitors at one level to protect themselves from non-group members who seek to compete at that level."[133] Where an explicit boycott occurs, a summary adjudication of illegality is warranted because the exclusion of competitors will injure competition and never produce benefits that cannot be obtained in less restrictive ways.[134]

The exclusivity provisions do not have the purpose or effect of keeping air carriers from entering the air transportation industry, or even from participating in the conference programs.[135] Entry into the industry at the level at which the agreement occurs is not foreclosed. Rather, the agreements preclude air carriers from dealing with persons on a different level in the distribution chain, except as provided for by the agreements. There are two effects on competition. First, competitive rivalry between air carriers in their distribution systems is circumscribed. Second, air carriers can use their combined economic power to structure relationships with their agents.[136]

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[131] *DOJ Brief* to Board at 34-35.

[132] 364 U.S. 656 (1961).

[133] *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978) and *U.S. v. Columbia Pictures Industries, Inc.*, 507 F.Supp. 412, 428 (S.D.N.Y. 1980). "Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. The group may accomplish its exclusivity purpose by inducing suppliers not to sell to potential competitors, by inducing customers not to buy from them, or, in some cases, by refusing to deal with would be competitors themselves." 593 F.2d at 1178.

[134] Sullivan, Antitrust, §85 (1977).

[135] As was discussed earlier the effects of the agreements on the production of air transportation services, is the focus of our competitive inquiry. *See* pages 29-30, *supra*.

[136] There is possibly a third effect. If indeed travel agents have obtained significant economic power in their dealings with air carriers, travel agents may be able to exclude competitors at their level. This type of conduct would warrant *per se* treatment.

DOJ argues that the use of combined economic power to structure vertical relationships also has been found to be a violation of the antitrust laws. It cites the cases of Paramount Famous Lasky Corp. v. U.S., [137] and U.S. v. First National Pictures, [138] as instances where such agreements have been struck down.

Judge Yoder concluded, and we agree, that the exclusivity provisions do not warrant per se treatment. [139] The cases have not been interpreted to create a rule of per se illegality for such conduct. [140] While the Supreme Court only gave the agreements a cursory analysis, they do not fall within the classic definition of a group boycott. The harm to competition in those cases was somewhat different from that in a classic boycott. It involved the use of combined economic power to extract trade terms from persons with whom producers deal that could not be obtained individually in the free marketplace. In those cases, competitors were acting as a cartel, that is, they were engaging in concerted action to extract terms that a monopolist would extract. Since no legitimate purpose was offered to justify the agreements, they were struck down. [141] We conclude, therefore, that the exclusivity provisions would be subject to scrutiny under the rule of reason if examined by a court. [142]

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[137] 282 U.S. 30 (1930).

[138] 282 U.S. 44 (1930).

[139] I.D. at 36 n.2.

[140] In those cases film distributors devised standard form contracts to be used in their dealings with exhibitors. In one case the challenged provision required film exhibitors to arbitrate disputes and in the other the challenged provision required exhibitors to provide security against default. In both instances film distributors agreed not to deal on different terms.

[141] Sullivan, Antitrust §90 (1977). Other cases often cited in this proceeding support a limited definition of the boycott rule. In Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), two distillers agreed to simultaneously change to a new distributor. They did so to take advantage of economies of scale. The court found the agreement not to be a boycott and subjected the agreement to scrutiny under the rule of reason. Similarly, in Deesen v. Professional Golfer's Association, 358 F.2d 165 (9th Cir. 1966) the court approved standards for participating in PGA events under the rule of reason.

[142] There is some case precedent, however, to support the proposition that exclusivity provisions are per se illegal. U.S. v. Columbia Pictures Industries, Inc., 507 F.S. 412, 428-29 (S.D.N.Y. 1980). See also ATC Agency Resolution Investigation, 29 CAB at 264-65 where we found that the ATC agency program would be in violation of the antitrust laws.

The fact that the exclusivity provisions will be considered under the rule of reason does not, however, establish any presumption of legali[illegible] While courts have upheld exclusive arrangements in some situations,[143] they have seldom allowed direct competitors to agree on the terms on which they would deal with persons at another level of distribution when the combined economic power of the participants would be sufficient to foreclose entry entirely or greatly restrict options in the marketplace.[144]

C. The Exclusivity Provisions Substantially Reduce Competition.

If the impact of agreements among producers of services is to lower price or increase supply, then on balance the public is benefited by them. However, as we have already indicated, the rule of reason requires that an agreement's various provisions relate to obtaining those efficiency objectives and place no greater restraint on competition than is necessary to obtain them. Close scrutiny is required to insure that the minimal possible restraint on competition occurs. Even where agreements improve efficiency, if the public would be better served by a less restrictive system achieving the same ends, the agreements must be disapproved.[145]

1. The effect of exclusivity is to reduce competition.

The most important effects of exclusivity are that it eliminates rivalry in air carrier distribution systems. It represents a surrender of the freedom to compete in the selection of sales outlets.[146] As one air carrier witness testified, its primary purpose is not to keep agents in line, but to keep a carrier's competitors in line.[147] Unless a carrier can convince all the carriers participating in the conferences that a non-direct marketing innovation is useful, it cannot be implemented. Any more efficient way of doing business is foreclosed if it cannot fit into the conference system.[148] Exclusivity, then, serves to deny carriers the flexibility to take advantage of persons who may serve the market even more efficiently.

143/ See J[illegible]rams & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 7[illegible]969).

144/ The [illegible]ramo[illegible] First National Pictures cases clearly support this propositi[illegible] S[illegible]mith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978); Standa[illegible] v. Magrane-Houston Co., 258 U.S. 346 (1922).

145/ Realty [illegible].S., 629 F.2d 1351, 1372 (5th Cir. 1980); Smith v. Pro Footba[illegible] F.2d 1173, 1189 (D.C. Cir. 1978); U.S. Trotting Ass'n v. Chic[illegible] Ass'n, Inc., 665 F.2d. 781, 790 (7th Cir. 1981). Hospit[illegible] Building Co. v. Trustees of Rex Hospital, 51 L.W. 2269 (4th Cir. Oct. [illegible], 1982). ASTA recognizes this. This is also our consistent interpretation of the analysis required under §412. See e.g., UATP Agreement, Order 80-6 66 (June 12, 1980).

146/ Rein (IATA) 1 O.A. Tr. at 91-92, 104. See also Ruggiero (IATA) 60 Tr. 80.

147/ Malin (USAir) 53 Tr. 53. See also Wilson (02) 45 Tr. 103-04.

148/ TKTN-T-3 at 21, Banks (NPTA) 80 Tr. 60-62, NPTA-T-1 at 41-42, DOJ-RT-1 at 11-17, Gellman (ATC) 36 Tr. 22-23.

The collective agreements also diminish innovation. Specialization, while not entirely foreclosed, is substantially chilled. [149] Agents who may conclude that they could more efficiently serve portions of the market in ways not permitted by the programs cannot contract with carriers outside the programs in order to implement their marketing strategies. Of course, persons who do not wish to become ATC or IATA agents are denied the same opportunities.

It is not sufficient to say that a carrier wishing to try a new approach may simply drop out of the agency program. Doing so would mean losing the efficiency benefits of common accreditation. Methods of distribution which may be more effective when used in conjunction with the common accreditation program will not necessarily save carriers money if their use requires abandonment of the joint agency system. [150]

Exclusivity now operates to eliminate the threat that a competitor will devise a better distribution system. This is not an insignificant portion of the price of air transportation. Distribution costs account for approximately 10% of the costs of air transportation services. Throughout our economic system, the threat of potential entry is relied upon to discipline the behavior of the participants in the marketplace. If conditions for effective competitive alternatives are foreclosed the price of a product or service tends to rise. Because exclusivity prevents entry into air transportation distribution systems, there can be no assurance that consumers are receiving the best service at the lowest price. [151]

Several parties have argued that there is evidence that commission costs are higher than they might be were the agency programs subject to the disciplining effect of potential entry from nonconference marketers. In this regard, commission rates have increased dramatically in the past three years, [152] and there has been substantial entry and little exit from the travel agency industry, [153] even in the midst of an industry recession. In addition, several carriers have recently attempted unsuccessfully to unilaterially lower their commission rates. These efforts appear to have failed because carriers now recognize that everyone will have to lower their rates if one carrier is to do so without significantly adversely

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149/ TKTN-T-3 at 26; NPTA-T-1 at 6-8; DOJ-T-1 at 11-13; Guerin-Calvert (DOJ) 84 Tr. 75-77, Banks (NPTA) 80 Tr. 61.

150/ *Columbia Broadcasting System v. American Society of Composers*, *on remand*, 620 F.2d 930, 935 (2nd. Cir. 1980).

151/ TKTN-T-3 at 21-26, NPTA-T-1 at 23-32 and 40-42, DOJ-T-1 at 10-11, DOJ-RT-1 at 18-20, Guerin-Calvert (DLJ) 83 Tr. 115-17. It does not matter if the travel agents rather than the air carriers receive the benefits of this conduct. The net cost is to the public.

152/ *See* Appendix D.

153/ *See*, pages 17-18, *supra*.

affecting its marketing program. [154] This problem may be traced to our decision to bar collective carrier action on commission rates without permitting different forms of entry. [155] That decision appears to have distorted the normal operation of the marketplace.

The proponents of the agreements respond with the observation that there are a large number of persons becoming agents each year. These new agent outlets compete with existing outlets for sales and insure that air transportation distribution costs remain at a competitive level. The weakness in this argument is that it ignores the many constraints the agreements place on the way agents can market the air transportaion product. Competition can occur only within the bounds set by the conferences. Agents know precisely what form their competition will take, and so are under less pressure to control costs and tailor service to customer demands. [156] In fact, one of ASTA's admitted concerns with the elimination of exclusivity is that it could lead to as yet unknown forms of competition and that all competitors will not be on the same competitive footing.[157] As long as exclusivity is in place, disciplining entry outside the conferences is eliminated.

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[154] In February 1980 United attempted to establish a flat fee system for compensating agents with the advent of open commissions. Following substantial adverse reaction from agents, the plan was abandoned after only about two weeks. NPTA-T-1 at 17. The witness suggested that the importance of travel agents to carriers under the existing exclusive system, in part, contributed to United's rapid reversal. Banks (NPTA) 25 Tr. 68-70. However, ASTA submitted evidence to show that any loss of sales to United was the result of individual agency decisions ASTA-R-1 at 7, and that traffic declines did not come from agents ticketing away because many of its competitors also experienced declines in that period. ASTA-R-5. In April 1982, five carriers made an aborted attempt to reduce commissions from 10 to 9 percent. The record is unclear as to why the effort failed. *E.g.* Ruden (ASTA) 1 O.A. Tr. 153. (The experiment was too short-lived for carriers to know the effect on bookings). Huisentruitt (ATC) 1 O.A. Tr. at 40. (Record evidence indicated that carriers meet each others commissions). Huisentruitt 1 O.A. Tr. at 57. (Carrier who lowers itscommission will lose its share of the market, if competitors on a route don't follow suit). Seybold (ATN) 1 O.A. Tr. at 190-191. (Rollback didn't stick because carriers believe existing level was proper). Fahy (AA) 1 O.A. Tr. at 206. (Reduction did not stick because other carriers didn't match). Fahy 1 O.A. at 208. (American waited to see if large carriers would follow suit on rollback before acting).

[155] In 1980, commission expense to carriers amounted to more than $1.5 million, an increase of 30 percent since fixed commissions were eliminated. 5 Tr. 113. In the year following that decision, commission expenses increased 163.8 percent. This does not suggest that we must revert to fixed commissions or that travel agents have as a group extracted monopoly rents. However, we cannot ignore the potential that foreclosing entry has resulted in commission rates above competitive levels.

[156] DOT-J-1 at 10-11, DOJ-RT-1 at 18-19, Guerin-Calvert (DOJ) 83 Tr. 115-117.

Moreover, it should be recognized that the programs create a commonality of interests among all agent participants. Each agent has the same economic interest vis-a-vis the airlines. Each agent also has an interest in keeping fellow agents from gaining any marketing advantage it does not have or does not choose to exercise.[158]

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[157] Bessel (ASTA) 69 Tr. 20 and 22.

[158] An agent "can do as much or no more than any other agent." Saunders (ATC) 40 Tr. 93. A related legal argument for disapproval of the existing programs, especially exclusivity, relates to travel agents' ability to influence air carrier marketing decisions. It has been suggested that our willingness, in the past, to intervene on travel agents' behalf to prevent abuses of air carriers' combined economic power may have actually served to shift significant power into the hands of travel agents.

Because of the substantial portion of transportation sold through agents, air carriers are careful to take into account agent reactions to their marketing decisions. There were numerous examples in the record of carrier marketing decisions in which agent reaction was an important factor in air carrier decisions concerning their distribution systems. E.g. ATC-JRC (RW)-5 at 4, 10; AA-IR-19 at 3; Kelly (NPTA) 23 Tr. 190, 191 and 24 Tr. 10,11; Eichner (TKTN) 76 Tr. 81-82 and Wilson (OZ) 45 Tr. 92. The ability to speak through trade associations and give the appearance of unified positions may well enhance travel agent influence. The conferences provide a variety of mechanisms for formal participation by recognized agents associations and others. See e.g., ATC-IR-31 at 1. Both ATC and IATA have established joint agent-carrier committees which propose and review conference action affecting the agency programs. (ATC Resolution 90.20 §XIII; IATA Resolution 840). The Travel Agent associations have used their ability to participate through these resolutions to achieve a number of changes which they consider to be beneficial, such as removal of ATC ban on UATP commissions and its airport and hotel location restrictions, and consider themselves to have this ability to influence carriers. (E.g. Bessel (ASTA) 69 Tr. 90, 99, 125). In addition agency groups communicate with carriers outside the formal conference mechanism. Shortly after the Board proposed to sever marketing exclusivity from ATC's fixed commission agreements, ATC circulated a mail vote to rescind exclusivity. That was a staff proposal based on the staff's view that ATC members still felt that it should be considered in the show cause proceeding. Buchannan (ATC) 38 Tr. 81-83. Air carriers immediately received strongly worded letters and telegrams from most travel agent organizations. ("We will not accept an industry program that leaves carriers free to deal with third party sales intermediaries outside of that program.") ATC-IR-70 at 9 setting out an

2. Virtually All Carriers Participate.

If a number of air carriers did not belong to the ATC and IATA programs our concerns about the competitive effects of common accreditation might be mitigated. Disciplinary pressure on distribution systems might come from marketing innovations of non-conference carriers who do not participate in the conferences. The marketing innovations of nonconference carriers, by lowering these carriers' costs, would be a spur to innovation within the conferences. Because they must compete, conference carriers could not then ignore nonconference innovations producing more efficient and less costly marketing systems. An alternative provider of marketing services, while cut off from dealing with conference members, could sell his services to nonconference carriers.

In order for this effect to be significant, however, the number and market position of non-conference carriers or marketing outlets must be great enough to impact the conference systems. That is not currently the case here. The 24 members of ATC, and 4 associate members, constitute virtually every major air carrier providing air transportation service in the U.S. The more than 100 members of IATA include almost every air carrier with operations to the United States. 159/ As such, the parties to

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158/ (Cont'd)
ARTA Telex; ("Passage of mail vote"...would have gravest of implications for air carriers and travel agents.") UA-IR-18G at 10 setting out an ASTA mailgram. ("In particular, we object to any change that would permit air carriers to pay a form of compensation to any person other than an accredited travel agent.") ATC-IR-70 at 7 setting out a AAA letter. The mail vote was defeated 15-5 with 4 absentions.

Travel agents' ability to participate in conference deliberations and to influence air carrier marketing decisions is of concern, because, to the extent it exists, travel agents could act to exclude new forms of marketers who might compete with them. Agreements with the purpose or effect of excluding competitors have generally been considered to have a pernicious effect on competition. Group boycotts are considered to be per se violations of the antitrust laws. Klor's v. Broadway Hale Stores, 359 U.S. 207 (1959).

However, we cannot conclude on the basis of this record that travel agents have the power to exclude competitors. The decision not to use other marketers is the decision of the carrier participants in the conferences. Although agents participate they do not vote. They have adopted the rules that preclude the use of other marketers. However, one of ASTA's current concerns is to give travel agents a vote on agency matters. JRC(TS)-IR-5. Should this come to pass, our assessment might be different.

159/ ATC-IR-3A. IATA-IR-3 at 3-7. Five carriers are members of both conferences. I.D. at 1 and 46, n.6.

the conference agreements have overwhelming market positions. Their conduct is not likely to be disciplined by the few small carriers that may choose to adopt alternate marketing systems.[160] This also means that potential distributors of air transportation services that do not conform to the conference standards are foreclosed from the distribution industry.

This is in marked contrast to situations in which exclusivity provisions have generally been upheld. In those cases, alternate sellers or buyers were present to discipline the behavior of parties to the agreements and persons cut off from dealing with parties to the contract had other avenues open to them to enter the marketplace.[161]

3. Most Marketing Alternatives Are Excluded.

The extent to which the exclusivity provisions injure competition also depends on the extent to which persons are excluded from the programs. Parties have argued, in this regard, that the standards for becoming an agent are really quite low. They cite the fact that 95% of all applications for accreditation are granted.[162]

While we believe many of the standards of the programs reflect areas of legitimate concern in appointing agents, the record does not demonstrate that these are the minimal standards air carriers would accept. In fact,

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160/ For example, Southwest Airlines' ticknet experiment was not adopted by any conference carrier. Nor was World's use of Ticketron followed. See Schmitt (TKTN) 74 Tr. 64-65.

161/ Proponents of exclusivity rely on a series of cases in which purely exclusive dealing contracts or contracts allowing existing shopping center tenents to reject applicants for shopping center space have been sanctioned. In most of these cases, however, the courts explicitly found that the parties involved represented such a small share of the market, that the challenged provisions did not foreclose the excluded person from the market entirely. See e.g., Oreck v. Whirlpool, 579 F.2d 126, 128-29 (2d Cir. 1978). (Manufacturer who terminated dealer's exclusive contract had only 1% of relevant market and other sources of supply were available); Westpoint Pepperrell Inc. v. Rea, 1980-2 Trade Cases ¶63,341 at 75, 743 (N.D. Cal. 1980) (alternate sources of supply were available). Optivision v. Syracuse Shopping Center Associates, 472 F.Supp. 665, 667 (N.D.N.Y. 1979) (optician excluded from shopping center had alternative commercial real estate available to lease.) C&K and J&K Inc. v. Fairway Shopping Center, 1980-2 Trade Cases ¶63,509 (Ohio Sup. Ct. 1980); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F.Supp. 983 (D.D.C. 1970) aff'd. 429 F2d 206(D.C.Cir.) and Jos. E. Seagrams & Sons. Inc. v. Hawaiian Oka & Liquors, Ltd., 416 F2d 71 (9th Cir 1969). Cf. Cartrade, Inc. v. Ford Dealers Advetising Ass'n of S. Cal., 446 F2d. 289 (9th Cir. 1971). (The court found that the purpose of the agreement was not to foreclose competition).

162/ See I.D. Appendix C, Table 6 at 1.

the testimony of record is that the programs do not reflect the level of qualifications individual carriers might require. [163] Moreover, the essence of the programs is to exclude. They set financial standards for prospective agents, personnel standards and location standards for becoming agents. Some persons and some ways of doing business are precluded from the program altogether. [164]

The 95% conference approval rate does not show the real effect of the conference standards. In fact, ATC receives twice as many inquiries on how to attain agency status as they receive actual applications. [165] The letters sent in response to inquiries explain the requirements of the programs in great detail. Persons cannot be realistically expected to undertake the cost and effort of applying for agency status knowing full well that their applications will not be granted.

ARTA argues that exclusivity does not in fact exclude any marketers except unqualified persons. In order to accept this view, we would have to be convinced that the existing accreditation standards are the minimum qualifications that each airline would be willing to accept before it would allow a person to write tickets. Judge Yoder implicitly rejected this argument when he found that marketers such as Ticketron and HATA had proposed viable business plans but were nonetheless excluded from selling air transportation. Moreover, other qualified businesses such as American Express and indeed ARTA itself have attacked specific provisions of the accreditation and retention standards which they believe to go beyond minimum business qualifications. Finally, as we have observed, airlines deal with presumably qualified persons such as bulk fare contractors and BTD's that do not meet all of the accreditation standards. We cannot therefore conclude that only unqualified sales outlets are now excluded from the marketplace. [166]

D. Disapproval of Marketing Exclusivity would not Eliminate the Potential Anticompetitive Effects.

The Initial Decision of Judge Yoder implictly recognized the need for disciplining alternatives to the conference programs. The disciplining force he envisioned was a group of persons acting in a non-agency capacity. In that group he placed Ticketron which he concluded had shown itself to be a viable alternative to travel agents. [167] He would not permit persons to enter the industry in an agency capacity, however, on the grounds that if air carriers could deal with other agents the benefits of the common accreditation programs would be threatened. As we will discuss more fully below, we believe the Judge's fears are unwarranted. Before we do so we will consider whether the disciplining effect of non-agent marketers is sufficient to insure the competitive performance of the air transportation distribution industry.

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[163] See Pfaff (American) 56 Tr. 129-32, Wilson (Ozark) 45 Tr. 59-63 and Nesbit (Continental) 48 Tr. 87-88.

[164] Persons who would do business primarily on their own account cannot enter, nor can persons who wish to provide services only on a part time basis, or only by phone.

[165] Buchanan (ATC) 39 Tr. 15 and ATC-T-1 at 54. Rein (IATA) 1 O.A. Tr. 89.

[166] See p.66, infra for individual carrier statements on minimum qualifications standards for conference agents.

Judge Yoder's distinction between agent and non-agent marketers is based on the view that the ATC agreements contain two types of exclusivity. The first, "agency exclusivity", prohibits a principal--sales agency relationship between an airline and any person other than an accredited agent. The second, "marketing exclusivity", prohibits the payment of sales remuneration or commission to any person, except accredited agents. [168]

Judge Yoder believed that with the disapproval of marketing exclusivity some new forms of distribution would arise. For example, if a person provides ticketing equipment for airlines to use, or space in which to place ticketing equipment on their premises, Judge Yoder believes airlines should be free to compensate such persons in any way they choose, including payment of commissions. At present, Judge Yoder believes such alternate non-agent marketers are prevented from doing business with ATC airlines only because of marketing exclusivity.

While we appreciate the judge's efforts to formulate a means of permitting entry, we have a number of reservations about the efficacy of the approach he adopted. As the Judge envisioned the group of non-agent marketers, they would merely dispense tickets without representing all airlines or giving travel advice. [169] Other parties have interpreted his opinion even more narrowly. For example, IATA believes that such a distributor would have to dispense tickets in its own name and to undertake responsibility for performance to make it clear to the public that the distributor was not acting in an agency capacity. [170]

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[167] I.D. at 66-68.

[168] IATA only has an agency exclusivity provision. The ALJ recommended that agency exclusivity provisions be approved and that marketing exclusivity be disapproved.

[169] I.D. at 67.

[170] Rein (IATA) 2 O.A. Tr. at 18. This would make the seller an indirect air carrier. Ticketron's arrangement with World was not that of indirect air carrier but what IATA would consider to be an agency. World, not Ticketron, was responsible to the passenger.

No one has been able to state exactly when a person becomes an agent. It has been maintained that what is an agency is governed by (1) the legal definition of agency; [171] (2) by whether inventory risk passes; [172] (3) by whether the person gives travel advice; [173] and (4) by the facts of the particular transaction. [174]

The suggestion that entry should be determined by reference to common law principles of agency would preclude virtually all marketing innovation. Agency relationships can be created when a person is authorized to act on another's behalf and could be applied to bar any marketer that seeks to represent a carrier in its dealings with the public. [175]

Even if a common law definition were not used, the category of non-agent distributors the Judge envisioned would be very narrow. Agency exclusivity would prohibit the new retailers from assisting purchasers by providing advice on the various fare and service offerings in a market. Apparently, passengers would have to know beforehand where and with which air carrier they wished to travel. When agency exclusivity is viewed in this way, it is unlikely that the new marketer could, except in rare circumstances, deal with more than one air carrier.

The evidence on the record suggests carriers interpret "agency" to be a broad concept. American informed Hotels-Auto Tour-Air (HATA)--one of the potential entrants identified in this case--that it could not deal with them because it would be an agent. [176] ATC now maintains that HATA can be compensated as a nonagent. However, the ALJ found that with his modification, that HATA could only be paid for providing translation services, but not for making reservations. [177] Similarly, to avoid conflict with the agency programs they would have Ticketron enter in a certain way. It could be compensated for some activities, like ticket distribution, but not others, like counseling. The weight of the evidence, then, suggests very little room exists beyond the agency programs for carriers to deal with new types of marketers.

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[171] Buchanan (ATC) 37 Tr. 66, 135-38.

[172] Gellman (ATC) 34 Tr. 118-21, Rein (IATA) 1 O.A. Tr. 99-100.

[173] Rein (IATA) 2 O.A. Tr. 15-16.

[174] Buchanan (ATC) 38 Tr. 96.

[175] *See* Restatement (Second) of Agency (1958) Courts determine the existence of an agency relationship based on a factual consideration of the constituent elements of the agreement, whether there is representation, a fiduciary relationship and the degree of the principal's control and not on whether the parties describe their arrangement as an agency. *Ford v. Willys-Overland*, 147 SE. 822. Indeed, some courts have considered the travel agent to be the agent of the purchaser. *Simpson v. Compaigne Nationale Air France*, 248 N.E. 2d 117 (1969). *Antar v. TWA, Inc.*, 320 NYS 2d 335 (1970); *Bucholtz v. Sirotkin Travel, Ltd*, 363 NYS 2d 415 (1974).

[176] BDA-H-11. 79 Tr. 14.

[177] I.D. at 60.

The Judge's disapproval of marketing exclusivity, therefore, may produce little, if any, realistic possibility of entry by new forms of marketing. More important, there would be no threat that a new marketer could compete with travel agents in distributing fare and service information, which is probably the most important role they perform today.

Moreover, the distinction Judge Yoder proposed has also been attacked as artificial and not fully supportable on this record. While it was accepted in the early part of this proceeding, it was later abandoned because the ASTA, ATC and IATA witnesses all recognized that the ATC exclusivity provision had had the same effect in the marketplace as the IATA provisions. [178] In fact, ATC has labelled the creation of a new classification of "non-agent ticket distribution" "a fiction without legal precedent". [179]

In addition, if marketing exclusivity precludes the use of non-agents to sell air transportation, it should have precluded the use of any alternative retailing system, particularly contractor bulk fares, where the contractor has assumed very little inventory risk. It has not. [180] Similarly, the absence of marketing exclusivity has not resulted in IATA carriers' use of non-agent marketing outlets within the U.S. [181] Judge Yoder was sufficiently uncertain about this distinction that he recommended that, in addition to disapproval of marketing exclusivity, Ticketron be given a specific exemption to provide services. [182]

Distinguishing between agent and non-agent distributors also presents a number of practical difficulties. The retention of "agency" exclusivity would require continuous screening of persons wishing to enter the marketing industry to determine whether or not they would create agency relationships with carrier members.

At first the screening would be done by the carriers. Because of the absence of any clear concept of agency, airlines would be reluctant to use marketers because their relationship might run afoul of the exclusivity

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178/ Bessell (ASTA) 70 Tr. 29, Gellman (ATC) 36 Tr. 25-26 and Person (IATA) 53 Tr. 158 respectively. As the presiding judge recognized, no party argued to him in their briefs that there was a distinction between the exclusivity provisions. I.D. at 82.

179/ ATC Brief to Board at 3-6.

180/ Buchanan (ATC) 38 Tr. 88-105.

181/ Gellman (ATC) 36 Tr. 25. The fact that British Airways considered the use of Ticketron means nothing. Ticketron spoke with several ATC member carriers in the same period. Schmitt (TKTN) 74 Tr. 65.

182/ In fact, the relationship between Ticketron and a carrier would probably be that of a principal-agent at law. Generally, anyone who is authorized to act on another person's behalf is an agent. Restatement of Agency (2nd) §15(1958).

provisions. [183] Non-agent marketers might well be unwilling to undertake the costs of determining the exact circumstances under which they could enter and of pursuing an uncertain course of action.

Moreover, a carrier's individual decision to deal with a person outside the accredited system would be subject to challenge before ATC and IATA. Persons wishing to deny a new marketer the opportunity to enter, or merely delay its entry, could approach ATC or IATA asking for a determination of whether an agency relationship is created. Other air carriers would then have an opportunity to disapprove the use of the new distribution system.

The last recourse, should a conference find the person to be an agent, would be to ask the Board if we intended to permit that form of marketing. We would, then, have to assume a larger regulatory role than we now perform, i.e., screening the types of marketers air carriers can use. We prefer to leave it to the marketplace to determine who should distribute air transportation and in what circumstances. [184]

E. Exclusivity is not Necessary to Preserve the Benefits of Common Accreditation

Proponents maintain that the exclusivity provisions are essential "to prevent circumvention of the standards". 185/ This argument takes three

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[183] That is, in fact, what occurred when Hotels-Auto-Tour-Air approached American Airlines to provide translation services. See page 51, *supra*.

[184] At oral argument counsel for Ticketron observed that the examination it underwent in this case to prove its viability to distribute tickets was more extensive than that which new airlines undergo in Board proceedings. Cullen (TKTN) 1 O.A. Tr. at 220.

185/ ASTA and other parties have cited a variety of cases in which joint venturer's rights to set standards have been upheld for the proposition that exclusivity is not anticompetitive. While all their cases uphold the use of standards for entry into joint activities, none of them establish the proposition that the need for standards in the association justifies an exclusivity provision that precludes members from dealing outside the association. Thus, in the real estate listing cases, the courts found that members were permitted, and in some cases encouraged, to deal with their own listings outside the listing service. Brown v. Indianapolis Board of Realtors, 1977-1 Trade Cases ¶61,435 (S.D.Ind. 1977) at 71612 and Iowa v. Cedar Rapids Board of Realtors, 1980-1 Trade Cases ¶63,713 (Iowa Sup. Ct. 1981) at 77042. In addition, in neither real estate listing case, did the listing service cover more than 20 percent of the market. In E.A. McQuade Tours v. Consolidated Air Tour Manual, 467 F.2d 178 (5th Cir.1972), the manual rejected publication of tours with certain Florida hotels, but McQuade, in fact, had contracts to represent these hotels outside of CATM. In none of the industry standards cases cited by ASTA, did the members of the standards bodies agree not to use unapproved products. See also Roofire Alarm Co. v. Royal Indemnity Co., 202 F.Supp. 166 (E.D. Tenn. 1962) aff'd. 313 F.2d 635 (6th Cir.), Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F.Supp. 154 (D. Ore. 1966) aff'd. 399 F.2d 55 (9th Cir. 1968), and Eliason Corp. v. National Sanitation Foundation, 614 F.2d (6th Cir. 1980).

In each of those cases the courts found that the standards had not been adopted to foreclose a particular competition. The courts concluded that exclusion of individuals who did not meet the standards merely reflected the competitive process at work. Although exclusion from the joint venture disadvantaged the competitor, the competitor was never excluded from the marketplace. The exclusivity provisions have a different effect. Because virtually all carriers participate in the collective decision not to use other persons, other persons are actually foreclosed from the marketplace. Finally, the sports and related cases that partiesrely on simply do not address the issue of exclusivity. With two exceptions, all of the cases involved participation in sanctioned events by persons who did not meet a sanctioning body's requirements. In none of these cases did the sanctioning body preclude members from participation in unsanctioned events. Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F.Supp. 1103 (D. Neb. 1981) aff'd. 665 F.2d 222 (8th Cir. 1981); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 552 F.2d 646 (5th Cir. 1977) and Bridge Corp. v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970). The two exceptions involve the U.S. Trotting Association, an association of harness race tracks, breeders and drivers. Its rules do, in fact, contain prohibitions on member drivers and breeders participating in unsanctioned races at non-member tracks. In the earlier of the two cases, however, United States v. United States Trotting Ass'n., 1960 Trade Cases ¶69,761 (D. Ohio 1960) the court, in upholding the standards, specifically found that these rules were not being enforced. In United States Trotting Ass'n. v. Chicago Downs Ass'n., Inc., 665 F.2d 781 (7th Cir. 1981), USTA had threatened to start enforcing the prohibitions because of abuses by non-member tracks. In remanding the case to the district court the court of appeals found only that the per se rule of illegality should not apply. It found that they must be tested under a rule of reason but it did not rule that the provisions were lawful under that standard.

forms. They argue that, absent exclusivity (1) carriers will not use agents accredited by ATC and IATA; (2) agents will have no incentive to enter the air transportation marketing industry through the ATC and IATA programs; and, (3) carriers will appoint unqualified marketers.

In order to properly evaluate these contentions, we must focus on carrier incentives. The record establishes that the incentives to continue to use the existing system are substantial. Specifically, the pronounced efficiencies of common accreditation and settlement induce carriers and agents to participate. The conference systems provide air carriers with many distribution outlets at a very low cost, because the screening, monitoring and enforcement costs are distributed among all conference participants. [186/] Carrier witnesses that testified indicated that they could not individually establish marketing systems without experiencing substantially higher costs. For that reason, Eastern's witness indicated it would remain a member of the ATC agency program if exclusivity was eliminated. [187/] Ozark's witness testified that exclusivity was not necessary to keep from not dealing with unaccredited marketers. [188/] Furthermore, ASTA's witness indicated that carriers would use all existing agents even if the conference programs themselves were disapproved. [189/] ASTA's economic witness also testified that agents might lose no more than 2% of their sales if the exclusivity provisions were disapproved. [190/]

Elimination of exclusivity will merely give carriers the opportunity to use other marketing alternatives in addition to conference accredited agents if they see that to be in their best economic interests, nothing more.

Travel agents provide a unique and valuable service to air carriers: the evidence of record clearly demonstrates that their historic role of promoting the whole spectrum of travel services has fostered the growth of the air transportation industry. No one has suggested that there are marketing outlets poised to replace travel agents. Rather, all the discussions have centered around entry to persons intending to specialize in providing services to small segments of the travel industry. These would complement the existing system of travel agencies.

Commonly accredited agents will have a distinct advantage over other potential entrants because of the cost savings inherent in the common accreditation program. Given the benefits of using common agents, a carrier is not going to abandon that system until the cost savings from using common agents are outweighed by excessive commission payments. The carriers that testified indicated that there could come a time when

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[186/] See pages 35-37 supra.
[187/] Blake (Eastern) 47 Tr. 61-62.
[188/] Wilson (Ozark) 45 Tr. 130-31 and 148-49. See also Nesbit (Continental) 48 Tr. 120.
[189/] Nathan (ASTA) 72 Tr. 164.
[190/] ASTA-20 at 110.

commission rates were so high that they would have to drop out of the programs. [191] But the carriers' only alternative under the present system is to open their own ticket offices. Carriers should not be forced to pursue this more costly alternative to common agents.

With our phased removal of exclusivity, the threat of entry into the marketing industry will insure that the costs of marketing air transportation are competitively set. When a new marketer can serve a portion of the travel market more cheaply, it will be able to approach carriers and afford them the opportunity to lower their costs without forcing them to give up the benefits of common accreditation. While we believe agents will continue to dominate the air transportation distribution system, that does not mean that exclusivity is unimportant in this decision. From an economic and regulatory standpoint, the possibility of entry is fundamental to competitive market performance. Potential competition--or the perception that there may be potential competition--is an important element in the free working of the marketplace.

The argument that agents will voluntarily withdraw from the ATC and IATA programs is also contrary to rational economic behavior given the incentives to participation in a common accreditation system. The ability to represent virtually all carriers as a common agent is the primary economic inducement to secure accreditation and participation. The argument assumes that the cost savings of meeting (presumably lower) individual standards will induce agents to leave the conference. An agent might generate some cost savings if, for example, it were subject to a lower bond requirement or it could employ individuals with less experience. But withdrawal from the common accreditation program would also entail substantial costs. Agents would have to undertake the cost of multiple applications and would have to satisfy multiple standards as well. If the agent attempted to deal with fewer carriers in order to reduce these costs, it would have a smaller product line over which to spread its overhead, and it would be at a competitive disadvantage vis-a-vis agents that remained in the system. The economics of common accreditation are such that it is not likely that agents will withdraw from the program entirely simply because a few carriers might offer lower standards. In short, agents and carriers have mutual incentives to participate voluntarily in the ATC and IATA programs in the absence of exclusivity.

We also reject the suggestion that without exclusivity air carriers will appoint unqualified persons. Air carriers will not return to the days of giving tickets to taxi drivers and hotel porters. Carriers recognize the potential for financial loss in appointing unqualified persons, because they are financially responsible for tickets issued in their name, including interline tickets. For these reasons, ATC's witness admitted that even without exclusivity carriers would act responsibly in selecting sales outlets. [192] Continental's witness testified that customers could distinguish between agents and other types of marketers. [193] and another witness testified that consumers would weed out incompetent marketers. [194]

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[191] See e.g., Blake (Eastern) 47 Tr. 20 and 62, Nesbit (Continental) 48 Tr. 86, and Palm (Republic) 52 Tr. 118.

Under the rule of reason, an agreement's provisions must be related to its efficiency objectives and be tailored to place no greater restraint on competition than is necessary to accomplish those objectives. With respect to exclusivity provisions, courts have rejected arguments that such provisions are necessary to induce participation in a joint venture. [195] An agreement that offers participants a significant potential for scale efficiencies they could not otherwise obtain, provides its own inducement to participants. [196] If carriers and agents believe, as we do, that the agreement yields significant efficiencies, they will participate in the common accreditation program regardless of the existence of the exclusivity provisions. If, on the other hand, carriers conclude that these efficiencies are outweighed by the costs of participation, we believe that they should be free to reach that decision without the coercive hand of the government-sanctioned restraints on their competitive behavior.

Since deregulation, we have consistently rejected the argument that carriers are incapable of acting in their own economic interest. For example, ATC at one time had argued that carrier participation in the ASP should be made mandatory and exclusive. We rejected this approach because we believed that the efficiencies of the ASP should attract its own adherents and carriers should be free to make independent business decisions about whether a program really offers the benefits promised by its creators. [197] Virtually all carriers have voluntarily chosen to participate and no harm has come to the ASP. [198] We think this evidence is indicative of the essential fallacy of the "competitive madness" arguments with which we are often confronted. In passing the ADA, Congress implicitly rejected the notion that carriers cannot be trusted to make decisions that most effectively satisfy consumer demands in a competitive marketplace. Although some carriers have made what might be regarded as bad decisions, they have paid the economic costs which is as it should be in a free economy. On the whole, however, air carriers have demonstrated that they are capable of making better decisions about how to run their businesses than could government regulators.

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[192] Buchanan (ATC) 38 Tr. 117. See also, Buchanan (ATC) 37 Tr. 39, Malin (USAir) 53 Tr. 62-64, Nesbit (Continental) 48 Tr. 121-22, Fierro Suissai for IATA) 65 Tr. 53 and TKTN-RT-2 at 17.

[193] Nesbit (Continental) 48 Tr. 161. See also ASTA 20 at 97-98.

[194] Daly (American Express) 66 Tr. 28.

[195] Associated Press v. U.S., 326 U.S. 1 (1945). We have rejected arguments that participation in a joint venture must be mandatory in order to preserve its benefits on a number of occasions. Orders 80-7-103 at 2, 81-9-83 at 5, 79-11-20 at 2.

[196] L. Sullivan, Antitrust, (1977) at 254-55.

[197] Order 79-2-91 at 3-4.

[198] Saunders (ATC) 44 Tr. 103-04.

We conclude, therefore, that the present exclusivity provisions substantially reduce competition in the air transportation marketing industry and that they are not necessary to obtain the procompetitive benefits of common accreditation. That does not, however, end our inquiry. The second step in section 412 analysis requires an examination of non-competition factors that may justify approval of the agreements. Anticompetitive agreements may nevertheless be approved if they provide important public benefits or serve transportation needs and such benefits are not attainable by materially less anticompetitive alternatives.

F. Public benefits and transportation needs.

We have concluded that most of the public benefits parties and the ALJ have cited in favor of the exclusivity provisions are really procompetitive consequences of common distribution systems. We have considered them under the Rule of Reason analysis because the reduction of distribution costs and the facilitation of information dissemination serve to increase competition between air carriers and competition within their distribution systems. We have already rejected arguments that these procompetitive effects could not be obtained if the exclusivity provisions are removed.

There are, however, three public benefits that have been alleged in support of exclusivity that we will now consider. These benefits are: (1) facilitation of interline agreements; (2) maintenance of public confidence in agents and (3) preservation of good relations with foreign nations. We treat them as public benefits because they do not strictly relate to arguments about competition in air transportation distribution.

With respect to interlining, proponents argue that current interline agreements between air carriers are dependent upon air carriers' mutual confidence in one another's agents. They maintain that air carriers are only willing to accept air transportation written by another carrier's agents and refund or exchange tickets because the conference agreements insure that accredited agents are competent. They will not have this confidence in agents appointed outside the conference programs and will curtail interlining, to the public's detriment.

There is no question that interlining is beneficial to the public. Approximately one third of all tickets that agents sell involve some interline transportation. 199/ However, we must be careful to delineate the relationship of interline agreements to the passenger agency programs before jumping to the conclusion that the existing forms of exclusivity are necessary to secure interline air transportation.

199/ ATC-D-11, ATC-T-1 at 18 and I.D. at 86, n.1. To a certain extent, interline agreements may produce efficiencies in passenger handling. Interlining is a joint activity distinct from the agency programs, and under traditional rule of reason analysis, restraints in a joint venture should be balanced against efficiencies in that joint venture, not an independent one.

At the present, travel agents write tickets by imprinting a carrier's name on blank standard ticket stock using that carrier's validation plate. Procedures for the issuance, exchange or refund of tickets are designed to facilitate settlement through the ASP. No matter how many segments of air transportation appear on the ticket, and no matter which carrier provides the service, the carrier whose plate is used or who is demoninated as the ticketing carrier is financially responsible for the entire ticket. 200/ In writing the ticket, the travel agent acts as that particular carrier's agent on the transaction. An agent can only legally make the carrier financially responsible for the ticket if the carrier has appointed that agent.

An air carrier cannot, then, force another to bear the financial loss on tickets written by a person outside the agency programs that the first carrier authorizes to sell its tickets. Rather, the proponents' benefits argument is that the second carrier will be less willing to interline with the first because the agents of the first carrier will overbook on the second flights, misticket passengers, and generally provide poor service to the public.

There is a degree of merit to this argument. Each air carrier has an interest, as does any business, in protecting its good will and reputation with the consumers it serves. In this regard, airlines will wish to avoid disruptions or inconveniences in their customers' travel plans. However, this interest does not justify the broad restraints of the present exclusivity provisions.

The agents' rights to write interline transportation are governed by interline agreements between the carriers. The agreements are distinct from the travel agent agreements. 201/ The incentive for carriers entering

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200/ If a carrier's ticket is used for connecting transportation, it guarantees payment to the transporting carriers regardless of whether it receives payment from the ticket issuer. Meredith (IATA) 62 Tr. 26-27 and 65-66; Proctor (IATA) 64 Tr. 11-12. Accounts between air carriers are settled through the Airline Clearinghouse or IATA Clearing- house. ATC-IR-4 and IATA-IR-5.

201/ ATC's conference agreement is ATC Resolution 5.65, Agreement CAB 239. It was first approved in Order #-2148, February 8, 1943. (ATC-IR-4 at 9-42). IATA's conference interline agreement is Resolution 8.50. (IATA-IR-4 at 3-19). In addition carriers can, and historically have entered into bilaterial interline agreements. *E.g.* Pan American World Airways and Summit Aviation, Agreement CAB 27701, approved by Order 78-12-65, December 8, 1978. After the filing of agreements was made optional, and we decided not to confer antitrust immunity on such agreements, (*see* Order 78-12-65 at 3 and notice regarding filing of 412 agreements in CAB Weekly List of Agreements filed 28-46 for week ending November 9, 1978), carriers have not filed their bilaterial interline agreements. *See, also* Buchanan (ATC) 37 Tr. 38 and Ruggerio (IATA) 62 TR. 126-29.

into interline agreements, of course, is having air transportation sold as widely as possible. [202]

We need not foreclose the possibility of new entry into the air transportation distribution industry to be certain that interlining occurs. Air carriers will interline with one another to the extent they find it to be in their economic interest. [203] As a part of that decision, carriers will consider the quality of the prospective interline partner's marketing outlets. The use of non-accredited agents by a prospective interline partner is merely one factor to be weighed in the balance.

Potentially adverse effects on interline service were predicted in connection with our decision in the tariff flexibility rulemaking. We concluded then, as we do here, that a properly tailored transition period such as we are providing for here would allow carriers to adjust their interline agreements to a new environment without delaying introduction of opportunities for new competition in the sale of air transportation. [204] The Board's rule has been in effect for over a year and no serious disruption of the interline system has come to our attention.

However, existing interline agreements were entered into with the exclusivity provisions of the conference programs in place. Conference carriers entering into such agreements could safely assume that persons outside the conference programs, other than the other carriers' direct sales outlets, would not be selling their air transportation. In view of our decision to eliminate exclusivity, carriers who might be concerned about the use of non-accredited outlets should be given the opportunity to revise their interline agreements. [205] However, we do not wish to unnecessarily delay the process of opening the marketing industry to the possibility of new entry.

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[202] Under the sunset provisions of the Airline Deregulation Act, carriers' duty to provide interline service in interstate and overseas air transportation terminates on December 31, 1982. 49 U.S.C. 1551 (a). No such duty exists for foreign air transportation. See 49 U.S.C. 1374(a)(2).

[203] Even today conference carriers are not required to interline with each other and even when they do they are free to adopt bilateral agreements. Thus by the terms of IATA Res. 850j, the standard agreement will be used only when carriers desire to exchange traffic and even then carriers may mutually agree not to require execution of the standard agreement. (IATA Res. 850j, ¶2). By its terms ATC Res. 5.65 applies only where parties mutually agree to interline sales under its terms. (ATC Res. 5.65, Preamble). Access to ATC agreements is available to all scheduled carriers holding certificates, foreign permits or exemption authority from the Board.

[204] See EDR-428, July 28, 1981, Orders 81-7-108, July 28, 1981 at 12-14 (tentative order), and ER-1246, 46 FR 46787, September 22, 1981 81-9-96, September 15, 1981 (final order).

We have, therefore, decided to disapprove exclusivity in two stages to permit new entry, while giving carriers an opportunity to revise their interline agreements. We are disapproving the exclusivity provisions immediately to the extent they preclude a carrier from contracting with persons, other than conference accredited agents, to sell its own air transportation. A carrier's interline partners have no interest in who it uses to write tickets that will only be used on its aircraft. The exclusivity provisions will continue to receive our approval until December 31, 1984 to the extent they preclude the use of nonaccredited agents to write interline transportation. We shall require that carriers are free to agree between or among themselves to honor tickets written by each other's non-accredited sales outlets for interline transportation affecting the agreeing carrier's routes. The two year period will afford carriers the opportunity to re-examine their interline agreements in light of our decision in this case. We encourage carriers to begin this process immediately and we are, of course, prepared to consider any changes that they submit for our approval. [206]

Our decision to temporarily approve the exclusivity provisions to the extent they preclude interline sales, despite their substantially anticompetitive effect, is founded on the conclusion that affording carriers an opportunity to reformulate their interline agreements is an important transportation need, not attainable by any materially less anticompetitive alternative.[207]

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[205] The current conference interline agreements do not appear to address the subject. ATC Res. 5.65 contains no explicit reference to travel agents. IATA Res. 850j Attachment A defines a ticket as something issued by or on behalf of a carrier and prohibits a ticketing carrier from directly or through agents rebating the transporting carrier's tariffs. (IATA Res. 850j Attachment A, ARt. I. §21 and Art. II). It contains no explicit authorization for agent written tickets, however.

[206] Our decision to limit the extent to which the exclusivity provisions may be applied, rather than disapproving the exclusivity provisions outright and permitting the conferences the opportunity to file a modified provision tailored to our concerns, is an effort to simplify the transition period we envision. Our approach eliminates the need for the conferences to reformulate exclusivity provisions for a limited period and, we believe, fairly defines the types of arrangements carriers may enter into during the transition.

We recognize, however, that carriers may wish to formulate new exclusivity provisions with the limited applicability permitted by this decision. Should such a provision be filed, we would approve it and grant it antitrust immunity until December 31, 1984.

We should make it clear that the eventual elimination of the exclusivity provisions at the end of 1984 will not alter accredited agents' ability to continue to write interline tickets after that time. Nor do we expect a significant reduction in the amount of interlining in the interim. Because an air carrier is already financially responsible for its tickets, conference carriers are willing at the present time to accept interline tickets written by persons other than agents. Air carriers interline with other carriers that place their ticket stock with commercial accounts. In those instances non-accredited persons are writing interline tickets.[208] Similarly, one air carrier does not know the qualifications of the other carrier's own employees, who also freely write interline tickets. In addition, non-conference carriers and their agents write interline transportation involving conference carriers.[209]

In addition, an individual carrier that wished to sell air transportation through a non-ATC/IATA accredited agent will necessarily be concerned about and therefore guard against the incompetence of its non-accredited marketing outlets. The carrier will be financially responsible for that person's actions and would be the likely target of the ill-will that an unqualified agent might generate.[210]

Moreover, as we have noted, interline agreements may be revised to foreclose non-accredited agents from selling air transportation or from earning commissions on such sales. If the other carrier's agents continue to write interline transportation, the first carrier can discontinue its interline agreements with the appointing carrier.[211] The appointing carrier would then have to weigh the costs, along with the ill-will and other costs of doing business with a seemingly unqualified agent, against the benefits of the relationship. A carrier would have sufficient economic incentives not to deal with incompetent marketers. Finally, with the conference system in place, consumers will continue to have ready access to a system for distribution of interline tickets. Consequently, speculation about the possibility of significant harm to the interline system is so remote that it cannot be used as a basis for indefinite approval of the current exclusivity provisions.

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[207] Any immunity, of course, ceases with the end of our approval on December 31, 1984. As will be more fully considered below, automatic immunity is not triggered for other provisions of the agreements by our action with respect to the exclusivity provisions.

[208] Randal Malin (USAir) 53 Tr. 67; JRC (CO)-18; JRC (EA)-31; UA-IR-30; AA-6; and Saunders (ATC) 44 Tr. 116-17.

[209] Meredith (IATA) 62 Tr. 65-66. *See* also Proctor (IATA) 64 Tr. 7-8 and 10-11.

[210] *See* page 46, n.158, *supra*.

[211] That is, in fact what American threatened to do with respect to certain Air Florida outlets. Fahy (American) 2 O.A. Tr. 52. Current resolutions also prohibit a carrier from authorizing the use of its plate to write transportation on another carrier if the second carrier has denied the agency its appointment. ATC Resolution 90.3 §X.B.

The second public benefit argument that we must consider concerns public confidence in the competence of travel agents. This argument is also premised upon the notion that total exclusion of non-accredited sales outlets is required to keep unqualified persons from passing themselves off as travel agents. We have already discussed why, from a carrier's perspective, it is unlikely that unqualified persons will be appointed. From the consumer's perspective, the argument assumes that consumers will forego air travel if they have unpleasant experiences with unqualified persons. That, of course, is not what occurs today in the air transportation marketing industry or any other industry. Consumers are not now protected from incompetent travel advice. They will react as they now do to poor service by taking their business to another marketer. [212]

Given the good reputation of ATC and IATA agents, they will have an advantage over any new marketer that may enter the industry. Existing agents can differentiate themselves by highlighting their ATC and/or IATA approval. They alone will be free to identify themselves as accredited travel agents. In this regard, ATC and IATA could promote the use of identifying trade names, such as "travel agent" or "travel counsellor" with the use of a seal or trademark. There is consequently no reason to believe that consumers will not be able to differentiate ATC/IATA agents from other marketers. [213] Moreover, which outlets prosper will be determined by how well each provides its services to the public.

The third public benefit argument raised by parties involves international comity and foreign relations. IATA has argued that any significant disapproval of the IATA agency program will be interpreted by foreign governments as a denial of fair and equal access to the U.S. air transportation market and adversely affect U.S. relationships with foreign governments. It suggests that this will prompt retaliatory action.

The evidence in the record indicates that foreign governments' basic concern was that we would disapprove the entire IATA program and deny them common agents for the sale of their air transportation within the U.S. [214] However, eliminating exclusivity will not have that effect. The conference programs will continue to receive our approval. Moreover, foreign carriers and U.S. carriers will continue to have exactly the same marketing opportunities within the U.S. Any carrier can continue to rely on the conference programs, appoint other types of marketers, or use both. Eliminating exclusivity merely gives them increased freedom in marketing their services within the United States.[215] It will not be a denial of fair and equal access to U.S. markets.[216]

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[212] See Daly (American Express) 66 Tr. 28.

[213] See Nesbit (Continental) 48 Tr. 161.

[214] See Rule 14 Statements of Position of Argentina, Phillipines, and France, filed October 31, 1980, Sweden, Denmark and Norway, filed November 25, 1980, Netherlands and Pakistan filed December 10, 1980, Israel, filed January 13, 1981, and the Latin American Civil Aviation Commission filed March 3, 1981. See also Salyer (IATA) 58 Tr. 49-51 and 108.

In finding foreign relations reasons for approving exclusivity, the ALJ relied heavily on a submission from the State Department that if foreign governments perceive that our actions seriously impinge on the IATA programs, they may be inclined to take retaliatory action and it will be more difficult for the U.S. to negotiate on behalf of U.S. carriers.[217] We are sensitive to the State Department's concerns over its ability to protect U.S. interests, but this concern must be balanced against the effects on air transportation within the U.S. Unlike IATA rate agreements, which have a direct and immediate impact abroad, the conference agency programs directly affect only the distribution of airline tickets within the U.S. We have in fact accommodated the competitive considerations to foreign government interests where those interests were directly and clearly affected.[218] On the other hand, we have also refused to allow foreign governments to control or interfere with essentially domestic aviation policies.[219]

We have carefully considered the impact of eliminating exclusivity on the continuation of the IATA program and the ability of foreign carriers to market their services in the U.S. We have concluded that the impact will not be detrimental. The record indicates that non-accredited sales outlets exist outside the U.S.[220] To retain a more restrictive agency system in the U.S. because some foreign governments might disagree would give them a substantial voice in domestic aviation policy. We cannot therefore find that foreign relations considerations require approval of the exclusivity provisions merely because foreign governments may view disapproval as inimical to their interests.

Finally, there is some suggestion in the record that the entry of new marketers into the industry will divert business away from agents, forcing marginal agents out of business. It is argued that this would force a contraction of the present agency system and reduce its procompetitive benefits.

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[215] We have already rejected the argument that foreign carrier concerns are a basis for deciding aviation matters within the U.S. ER-1246 at 12, September 15, 1981 and Order 81-11-58 at 5, November 10, 1981.

[216] Fierro (IATA) 65 Tr. 25.

[217] I.D. at 98-102.

[218] IATA Show Cause Proceeding, Order 81-5-27, May 6, 1981.

[219] ER-1246 at 12 and Order 81-11-58 at 5.

[220] A number of foreign carriers use "bucket shops" or other unaccredited outlets in a number of countries. Proctor (IATA) 64 Tr. 21, Meredith (IATA) 62 Tr. 100-05, Ruggiero (IATA) 59 Tr. 169-76, and 65 Tr. 157-60. U.S. carriers are often at a disadvantage when attempting to market their services abroad. For example, US flag carriers have been denied access to reservations systems in Europe. See ATC-IR-118 at 21-30. TWA has filed a complaint with respect to such practices. See Order 82-6-114.

Carriers and the public have found that travel agents provide a valuable service and generally meet their needs for service. No one has suggested that their role will be entirely displaced by other types of marketers. Rather, the immediate interests of identifiable new entrants will most likely focus on serving discrete needs in the marketing industry that may be better served by alternate marketing systems. We have no firm basis to conclude that phased disapproval of exclusivity will result in any significant displacement of existing agents.

THE ESSENTIAL ELEMENTS OF COMMON ACCREDITATION

Our phased disapproval of the exclusivity provisions will enable ATC and IATA members to deal with and compensate persons other than those appearing on the accredited agent's list. Now we turn to the question of the reasonableness of individual provisions of the conference programs. Because this complex agreement has procompetitive effects, we will examine whether the various restraints it contains relate to its efficiency objectives. If the restrictions are not related to these objectives, then antitrust principles would dictate that the offending provisions be disapproved.

Given our decision to remove the exclusivity provisions, it may be argued that review of the individual standards of the agreements is unnecessary because any person wishing to enter the air transportation marketing industry may do so outside the conference programs.

Sound antitrust analysis, however, requires a close examination of individual provisions. If certain provisions of an agreement among competitors are related to attaining its procompetitive efficiencies but place unnecessary or undue restraints on competition, the maximum benefits of the programs and competition cannot be realized. Moreover, given the overall efficiencies of common accreditation, we cannot confidently predict that potential agents can escape the effect of unduly restrictive standards by going outside of the conferences because the cost disadvantages may be too great to be easily overcome. Because regulation has produced a system of pervasive restraints, and where the participants include virtually all competitors of consequence, we believe that close scrutiny of individual provisions is imperative.

We begin our examination of the reasonableness of accreditation standards by determining the essential elements of the common accreditation system. Our analysis addresses three questions. The first is what functions the provisions perform. The second is what types of standards are necessary in order for the conferences to function. The third is whether current ATC and IATA rules on those subjects are reasonable, i.e., are they the minimum necessary to induce carrier participation in the common accreditation program.

From the carrier perspective, the primary functions of the accreditation programs relate to the efficiencies resulting from the delegation of functions that would otherwise be duplicated by individual carriers. The conference programs eliminate duplication in information gathering on prospective agents, the review of applications to determine if they meet the standards of the programs, and the monitoring of existing agents to assure continued adherence to qualification requirements. [221]

That does not mean, however, that the standards must be such that every carrier will appoint every agent. Carriers must retain some freedom not to deal with individual outlets. That freedom is, in fact, preserved in the existing conference agreements. Carriers have only delegated to the conferences the authority to determine whether an applicant meets the conference standards. In other words, the conferences accredit agents. However, air carriers are free to instruct the conferences that specific agents cannot sell air transportation on their behalf. Individual carriers retain the discretion to appoint an agent. [222] While appointments are withheld infrequently, a mechanism is in place for individual carriers to refuse to deal with, i.e. appoint, a particular accredited agent. [223]

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[221] We have already rejected the argument that ATC's and IATA's role should be limited to collecting information on prospective agents. Some of the benefits of the programs would be lost if carriers had to assume the cost of reviewing the qualifications of individual agents and monitoring agent activities. See pages35-36, supra.

[222] The effect of such instructions is to preclude an agent from writing tickets (using that carrier's plate)--for that carrier. Interline transportation involving that carrier may still be written, but no commission will be paid. ATC-IR-72.

[223] By agreeing to blanket appointment of conference agents, carriers have in essence created a presumption of appointment. See page 22, n.63. supra. It should be recognized, however, that a newly appointed agent's ability to sell air transportation on a specific carrier's behalf is significantly curtailed if an air carrier does not provide it with a validation plate. If the agent is automated, no plate is necessary.

It is clear certain types of standards are necessary in order for ATC and IATA to perform the functions which have been delegated by the carriers. To determine what subject areas are appropriate for joint carrier decisions, we look to carrier testimony on the subject and the role of the travel agent in selling air transportation.

The testimony of the witnesses in this proceeding suggests that carriers will not participate in programs that do not consider a prospective agent's competency to ticket air transportation, its financial integrity and its record of honesty in past business dealings. [224] Although the questions were posed in different ways, the responses were remarkably similar:

> Eastern is interested in competence, financial integrity and (ticket) security. Blake 47 Tr. 51-52.
>
> USAir wants some minimal standards of experience, knowledge and financial integrity. Malin, 53 Tr. 62.
>
> American is not concerned about rules other than those relating to professionalism and financial and being open to the public responsibility. Promotion requirements are obsolete. AA-T-1 at 6.
>
> American Express said reasonable standards relating to financial responsibility and to other business-related fitness questions. A-107 at 2-3.
>
> ASTA indicated that there was a need for financial and personnel standards. The abandonment of other standards would have positive or neutral effects. ASTA-20 at 97-98.
>
> DOJ said there should be minimum standards to prevent fraud and insure financial integrity. Guerin-Calvert 83 Tr. 146-47.
>
> NPTA stated standards relating to knowledge, background, experience and financial responsibility are permissible. Prairie 22 Tr. 122-23.

It is unlikely, therefore, that carriers would be willing to delegate to the conferences the authority to appoint persons as their agents in the absence of standards in these areas.

An examination of travel agents' roles in selling air transportation also supports standards in these areas. IATA identified expressly four functions that a travel agent performs--information provider, service provider (ticket issuer), trustee of funds collected on carriers' behalf, and traffic generator. [225] As information provider and ticket writer, an agent can bind a carrier to contract under terms that carrier never intended by providing incomplete or simply erroneous information. For example, the carrier can be bound to provide service at less than its established price or the carrier may find itself liable for lost or damaged baggage or failure to provide transportation in amounts which exceed those established by the carrier in setting its ticket prices. In addition, the ill-will generated by errors in this area may reduce the traffic generation benefits of the agent. For that reason, it is reasonable to conclude that some form of competency standards are necessary.

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[224] The security of traffic documents was also a common concern. We will consider that question as part of the ASP.

As a trustee of carriers' funds, the agent exposes carriers to risk of loss, if through dishonesty or lack of financial stability, funds collected by agents are not forwarded to the carrier. It is reasonable to assume that carriers acting individually would adopt standards to protect themselves against these risks and that they would not participate in a common accreditation program which did not provide such protection.

The agents' role as traffic generator raises more complex issues. To the extent that the mere presence of a large network of marketing outlets generates traffic, this would seem to be a legitimate objective of the conference programs. This concept of promotion includes the notion that whenever a person provides to the public information on fares and services he is facilitating the purchase of air transportation and, thereby, promoting it. Indeed, as noted above, the existence of established distribution systems in new markets probably enhances actual and potential competition.

Historically, however, promotion has meant the inducement of sales that would not otherwise be made. In the early days of the air transportation industry agents were given the role of trying to convince vacationers to fly, rather than travel by rail or bus, while the airlines served the portion of market that had to fly through their direct outlets. [226]

Standards based on this concept of promotion stand on less secure footing than those on the more limited concept. The concept is really very vague. If the concept is that promoting involves additional tasks, other than simple ticketing, it is clear that much of travel agents' current business is non-promotional. In-plants and travel agencies that focus on corporate business do not promote air transportation in the historic sense. In these instances, they are being compensated for providing ticketing and reservations services. [227] In fact, simple sales seldom involve promotion.

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[225] IATA Brief to the Board at 46.

[226] See Buchanan (ATC) 37 Tr. 29. See also Order 70-12-165 at 27.

[227] Gellman (ATC) 34 Tr. 76-77; Buchanan (ATC) 36 Tr. 88; Blake (Eastern) 47 Tr. 35; Saunders (ATC) 49 Tr.76-77.

While we will discuss the application of the promotional requirements to individual provisions, it seems clear that the conferences should, during the transition period we have provided, attempt to clarify their promotional requirements. They should carefully define the nature of the promotion they will require, cognizant of the fact that many travel agents do not promote to any significant degree (in the historic sense) and that conference standards cannot arbitrarily exclude persons from their programs.

Having identified integrity, competence and financial stability as appropriate subjects for standards, we must still determine whether the particular standards are more onerous than necessary to attain air carrier confidence in conference approved agents.

No party at this stage of the proceeding seriously opposed the existing financial requirements, 228/ and we find that they do not unduly restrict competition.

Both the ATC bond requirement and the IATA capitalization provision appear reasonably tailored to carriers' legitimate interest in the financial stability of their agents. IATA's capitalization requirement is evidently premised on the view that an agent will be better prepared to conduct a business if the applicant has a significant amount of its own capital at risk in the venture. ATC, on the other hand, apparently believes the preferable approach is to require the posting of a bond to protect members from loss at the hands of the agent.

Neither requirement has been shown to have a significant adverse effect on competition. Few applications are ultimately rejected on financial grounds. 229/ The cost of obtaining a $10,000 bond is approximately $79 for a person with a good credit standing and the cost of the average bond was about $200. 230/ Similarly, the IATA minimum capitalization requirement does not appear to impose an undue burden on prospective applicants. Determination of a mutually acceptable capitalization level is, in large measure, a matter of judgment. No one has complained that it is unreasonably high and the amounts required seem to be less than most persons would have on hand if they were beginning a business. 231/

228/ The text of the financial standards is set out in Appendix E. The Fifth Circuit Court of Appeals in *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178, 188 (5th Cir. 1972), upheld the imposition of integrity and responsibility standards as a condition to the participation in a joint venture. At one time DOJ and NPTA urged disapproval of all common accreditation standards, on the grounds that any such standards would impede individual carrier flexibility in appointing agents. DOJ has abandoned its position and does not now challenge the financial standards. Although NPTA's current position with respect to these standards is unclear, we find, in any event, that some financial standards are necessary to accomplish the efficiencies of common accreditation.

229/ ATC indicates that only 40 applications were rejected in 1979 because of the absence of a bond. ATC Brief to the Board at 2.

230/ ASTA-20 at 54. I.D. Appendix C, Table 9.

231/ Knodt (ASTA) 68 Tr. 77-78.

Moreover, both standards are objective and easily administered. With the bonding requirement the bonding company will actually evaluate the agent's financial status, rather than ATC. Thus there is little risk that the standard will not be fairly administered. [232] Nor does the IATA rule lend itself to arbitrary application. Both the working capital and stockholder's equity rule are straightfoward and easily verifiable.

ATC wishes to impose an additional financial standard on persons who would enter their travel agency program. They have filed with us for our approval, and we have consolidated into this proceeding, an agreement which would require individuals connected with travel agency applicants and certain authorized agencies to guarantee personally the performance obligations of the agency arising under the ATC Sales Agency Agreement. [233]

Since the time of original filing, ATC has indicated its willingness to limit the circumstances in which the guarantee could be involved. It has made it clear that it would not enforce the guarantee until the ATC agency bond has been exhausted and that the guarantee would only apply to sales of the type covered by its bond. [234]

During the course of the proceeding, ATC indicated its intention to modify the agreement further. ATC would no longer require the personal guarantee from all applicants. Rather, it would apply it only to an agent which has defaulted or where the Travel Agent Commissioner so orders. In addition, limited partners would no longer be required to provide a personal guarantee. ATC also indicated it would apply the personal guarantee to incorporated agencies owned by a corporation. The shareholders of the parent corporation would be required to provide a personal guarantee as if they held the stock of the agency directly. [235]

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[232] See ATC Agency Resolution Investigation, 29 CAB at 267. The Board required fair and objective review procedures and elimination of the need and sponsorship provisions to assure that the agency resolutions were not used to protect carriers and existing agents from new agent competition. See also Order 72-4-114, April 20, 1972, in which the Board disapproved substitution of a complex financing standard for the bond. Over the course of time, the conferences have adopted a variety of measures to assure fair application of their rules. At the present time both conferences provide for review of disapproved applicants by an independent travel agent commissioner with a right of appeal to binding arbitration. The ATC provisions (currently set forth in Res. 80.4) were originally approved on a trial basis in Order 75-6-49, June 10, 1975, and subsequently approved in Order 79-11-21, November 1, 1979. IATA's program (IATA Resolution 802d and 802) was approved on an interim basis by Order 80-7-112, July 17, 1980, with the rest of the current program.

[233] The text of the proposed agreement appears in Appendix E. By Order 79-11-196, November 28, 1979, we conditionally approved the agreement. On reconsideration, however, we withdrew our approval pending a review of its ramifications in this proceeding. Order 80-8-64, August 12, 1980.

[234] Order 80-8-64 at 3.

Judge Yoder recommended that we approve the personal guarantee with the changes proposed by ATC. No party objects to the agreement as modified.

We will adopt the Judge's recommendations. While ATC has not justified imposition of the personal guarantee on all applicants, as ATC originally proposed, its latest formulation will only apply to situations involving unusual risk of loss to air carriers. Applying the bond to all applicants is not required because, as the ALJ found, losses in excess of bond have stabilized in recent years at less than $1 million. [236] These losses represent a small portion of total agent sales, potentially less than 0.1 percent. [237]

However, we are concerned that the provision not be applied in a way that unnecessarily restricts travel agent resources. Although the personal guarantee would not, in a legal sense, create a lien on personal assets of the agency's owners, it could be perceived as an encumbrance by lenders and thus make it more difficult to obtain financing. ATC should attempt to clarify that its proposal does not create a security interest in an agent's assets.

In addition to finances, ATC and IATA examine a prospective agent's background to determine if it may attempt to defraud carriers or the public. They preclude accreditation if there is a false statement in an application, the applicant is a convicted felon (ATC only) or has been found guilty of willful violations of fiduciary obligations to the public or to airlines (IATA), has been adjudicated bankrupt (ATC only) or has had a previous license suspended, unless the Administrator determines, after investigation, that the applicant can be relied upon to adhere to the terms of the agreement. [238]

No party opposes the honesty provisions at the present time and the ALJ concluded that they should be approved. The purpose of the honesty provisions is to assure that agents carry out their role as trustee of blank ticket stock, carrier plates and funds they collect from consumers. No carrier could reasonably be expected to entrust ticket stock and money to a person whose integrity is doubted. The existing provisions appear to be reasonably tailored to meet this end. The provisions refer to specific circumstances which might reasonably lead one to question the integrity of an applicant.

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[235] See ATC Reply Brief to ALJ at 60.

[236] I.D. at 134-135. In comparison, losses from tickets by mail were over $14 million. ASTA-10 at 7-8.

[237] Id. Precise comparisons are difficult to make because exhibits on the subject generally compare both domestic and international losses.

[238] The text of the agreement appears in attached Appendix E.

With respect to competency, the ATC and IATA rules focus upon whether there are persons employed at an agency with managerial and ticketing experience. [239] In contrast to the financial and honesty standards, there is some opposition to the provisions designed to insure the competency of accredited agents. American Express and NPTA challenge aspects of the manager qualification requirements and DOJ challenges aspects of the ticketing experience provision.

American Express does not oppose the content of the managerial standards, but the application of those standards to branch offices. In American Express' view, multiple location agencies should be allowed to determine the qualifications of their own branch office managers. Because the managers' duties are usually administrative and the actual ticketing and counseling is done by others, American Express maintains there is no necessary correlation to agency competence.

American Express recognizes, however, that reasonable standards relating to business needs are justifiable. [240] The different aspects of the conference standards for qualifying managers all have been related to business needs. The reason to require the manager of the location to exercise daily supervision and responsibility while the agency is open is apparent. The manager is responsible for insuring that the location functions smoothly, handling complex problems, dealing with customer complaints and so forth. It is also reasonable to require that the manager be familiar with the travel industry and, in addition, with the basic procedures involved in operating an agency by demonstrating familiarity with the Travel Agent's Handbook. Admittedly, the standards do not insure that persons using an agency location will always be properly ticketed. But, perfection is seldom obtained in any endeavor. The standards reflect a reasonable effort to insure that each agency has a person on the premises competent to handle most travel problems and available to address them. American Express does not oppose these rules when applied to individual agency locations. Rather, it seeks a special rule for its special situation. By their very nature, standards in joint ventures must limit the options of participants. The fact that they are not optimally suited to an individual participant's mode of doing business does not without more make them unreasonable under the antitrust laws.[241]

We nevertheless recognize that there is a measure of validity to American Express' arguments. Since home office locations are financially responsible for losses caused by their branches, [242] there would seem to be a lesser need to impose a managerial standard on such locations. Home office liability protects the carrier and provides incentives to the agent to insure branch manager competence.

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[239] The text of the ATC and IATA resolutions appears in Appendix E.

[240] Am Ex-107 at 3. DOJ states that carriers have a legitimate interest in agent competence. DOJ Brief to Board at 44.

[241] We reject NPTA's objection that the managerial standards might be used to deny persons who have worked in business travel departments from being managers for the same reason.

[242] ATC Resolution 90.3 §IV.D.4. and IATA Resolution 802 §C(13).

There is also merit to DOJ's arguments with respect to ticketing experience requirements which it challenges on the grounds that some types of experience are unreasonably excluded from consideration as credit toward the experience requirement. Specifically, experience obtained in corporate travel could not be considered, no matter how long a person worked there.

DOJ has suggested a significant weakness in the ticketing experience requirements. Both conferences, but especially ATC, look to where experience was earned, rather than attempting to formulate standards based on the actual ticketing ability of the applicant. DOJ contends that a preferable approach would be to test an individual for basic ticketing skills. Such a program would be far more objective. In fact, ATC once adopted a testing program. It was never implemented, however.[243]

In addition, we are concerned because both ATC and IATA apparently require that the managerial or counseling experience include promotion of transportation services, in the historic sense of generating additional traffic.[244] As we have already noted, many travel agents generate little or no travel. For that reason, a standard based upon this concept appears somewhat arbitrary and, therefore, suspect.

We will not, however, require ATC and IATA to modify their rules. Rather, we will leave any changes to the resolutions to the conferences themselves. They may wish to reconsider their management and ticketing experience requirements as well as some of their other standards during the transition period we are providing for the travel agency agreements.

No one challenges any other aspects of the competency standards and we find that none of them unreasonably restricts competition. While the standards may be higher than those that would have arisen in a competitive market, after the end of antitrust immunity for the conference programs in two years, we would expect that standards will adjust to the demands of a competitive system. With respect to specific standards, the requirement that the travel agent demonstrate knowledge of the handbook insures that the agency will be operated in accordance with conference rules. In addition, the handbooks contain technical information on operating practices. Likewise, the general requirement that the manager be present to exercise daily supervision over the agency when it is open for business helps ensure that the location is operating properly. Moreover, it appears that this provision is being administered with some degree of flexibility.

243/ Approved by Order 75-6-41, June, 9, 1975. The program was apparently dropped because of significant travel agent opposition. See ATC-T-1 at 52 and ATC-T-2 at 33, 34. See also ATC IR-74 at 15-278. A testing program need not supplant an experience requirement, but could be offered as an alternative means to establish ticketing competence.

244/ ATC defines travel counselor in its restrictions. The definition requires that the person have dealt with the public in the promotion or sale of general travel services. It is apparently interpreted to require experience to generating new sales. *See* Jauneters 40 Tr. 68-69 at 33. While ATA does not define travel counselor, it apparently interprets the term in the same way. Ruggiero (IATA) 61 Tr. 84-89.

IATA and ATC have also identified a category of rules they label as location standards. A number of provisions have been placed in this category. The basic location requirement is that travel agents operate only from approved locations.[245] These standards apply to both home office locations and any branch offices an agency may wish to open,[246] except for ATC in-plant locations. ATC and IATA review the suitability of the premises on which an applicant proposes to operate. Toward this end, ATC's provisions require that photographs of a proposed location must accompany an agency application.[247] Frequently, the premises will be visited by an inspector to determine whether the proposed location is acceptable.[248] Since very few applications are disapproved on the basis of unacceptable locations, it appears that the rules are liberally applied.

As a practical matter these requirements require the agency location to be in operation before the application is filed. Parties argue that the purpose of the basic location standard would be frustrated if applicants could rely on planned locations where the plans might never come to fruition. This requirement does not appear to cause prospective agents significant hardship. Both conferences permit applicants to sell air transportation while an application is pending and both provide for compensation on such sales regardless of whether the application is eventually approved.[249] In addition both conferences attempt to process

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245/ ATC Resolution 90.3 §I and IATA Resolution 802 §A(2).

246/ As of December 31, 1979 there were 11,144 independent ATC accredited travel agent offices, 1,636 home offices and 3,332 branches. ATC-IR-931 at ii.

247/ ATC Resolution 90.3 §V.B.4.

248/ Buchanan (ATC) 37 Tr. 115 and IATA Resolution 802 §D(2)(e). Between October 1978 and October 1979 only 5 applications to ATC were disapproved on the grounds that they failed to meet the location requirements. ATC-IR-14 at 1-12.

249/ At the present time commissions are paid retroactively, after a decision on the application has been reached. See e.g. ATC-T-2 at 5. However, during the course of the hearing witnesses testified that the payment of commissions to applicants periodically pending decision would not add significant administrative burdens for carriers. See Fierro (Swissair for IATA) 65 Tr. 47-49, Meinkoch American 56 Tr. 41, 42. and 58 Tr. 119. As a result of that testimony, both ATC and IATA have indicated their intention of filing amendments to their resolutions providing for periodic payment. I.D. at 146-47. Judge Yoder concluded that the provisions should be approved subject to the adoption of the indicated amendments. We do not believe a specific condition requiring the change is necessary. ATC has in fact filed such an amendment. This agreement, Agreement CAB 28217-12, was approved by Order 82-2-10, February 3, 1982. With respect to IATA, we prefer that air carriers themselves make changes to their resolutions, given our decision to eliminate exclusivity and withdraw antitrust immunity on December 31, 1984. Of course, if such amendments are filed, they would be approved.

applications in 60 days or less. [250]

We believe the requirement that accredited agents operate only from locations that appear on the accredited agents list can be tied to the objective of insuring the security of valuable traffic documents. Absent such a requirement, it would be far more difficult to monitor agent use of such documents, to head off fraudulent activities, and to take enforcement action when it appears necessary. [251] As a result, the basic location requirement stands on the same footing as the financial requirements.

The specific requirement that locations conform to security regulations, which is also sometimes referred to as location requirements, also appears to be reasonable. The regulations themselves are specific and objective and no party has suggested that they impose an undue burden on agents. Under the resolutions, compliance provides agents with a direct benefit. In the event tickets are lost or stolen, in certain circumstances, agents may be relieved of liability to carriers for lost and stolen tickets which the carriers honor. Moreover, none of these standards have been challenged by any party.

However, DOJ objects to two other aspects of the location requirements. First, it argues that the requirement that a location be freely accessible to the public may keep out firms that may find they can effectively meet consumer demands by operating by telephone or by specializing in sales to particular groups or engaged solely in ticketing services. [252]

The requirement that locations are freely accessible to the public for the promotion and sale of air transportation is justified on the grounds that it is necessary to encourage the promotion of passenger air transportation. [253]

DOJ and ATC basically repeat their respective arguments in opposition to and support of the ATC rule that provides that an agency must be open for business no less than 35 hours a week, [254] and the IATA rule that requires that an agency adhere to a regular schedule in accordance with local business practices. [255]

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[250] The text of the location provisions appears in Appendix E.

[251] An ATC witness implied this in his discussion of the ATC requirement that an agency be open at the time of its application. See Buchanan (ATC) 38 Tr. 44-49, 54.

[252] DOJ Brief at 45.

[253] ATC Reply Brief to the Board at 45, citing Buchanan (ATC) 37 Tr. 85-85, 181-82.

[254] ATC Resolution 90.3 §IV.A.4.

Insofar as these provisions are based on notions that only persons who generate air transportation sales should be accredited, they would appear to go further than is necessary to accomplish legitimate objectives of the programs. As we have already indicated, no one has been able to quantify an amount of new sales that each agency should generate. That fact does not, however, in our view justify disapproval of these provisions as unreasonable restraints on competition. These provisions also relate to the legitimate goal of increasing public access to distribution services. While they could be refined to more carefully accomplish that purpose, and perhaps be eliminated, we prefer that air carriers themselves decide whether to make such changes. [256]

This completes our review of provisions falling within general categories of permissible standards. We have not examined the provisions that parties have argued fall into these categories in detail but have dealt with those that clearly fall within or outside the legitimate objectives of the programs. Generally, these provisions do not appear on their face, or as construed by the conferences, to unnecessarily restrict competition and we will approve them. Having identified goals that would be recognized by the antitrust courts, and potential problem areas in the agreements, participants in the conferences should have no difficulty in reaching conclusions on the types of standards that will withstand scrutiny under the antitrust laws. We will now deal with individual restraints within the programs that parties have challenged as unreasonable invasions into the ways carriers and agents may do business.

REQUESTED MODIFICATIONS OF THE PROGRAMS

A. BTD Restrictions

Many corporations assign specific personnel to arrange travel plans on behalf of their employees, frequently on a full-time basis. These corporate travel departments or business travel departments (BTD's) will perform many of the same functions as a travel agency, such as calculating the best fare and service options, making reservations, writing tickets, and arranging hotel accommodations and car rentals. As we have already noted, many of them use the same automated equipment that might be found in a travel agency. [257] Both the ATC and IATA rules contain provisions that prevent such offices from attaining agency status. It is the combined effect of two provisions that actually accomplishes this result. The first of these is the 20% rule which prohibits anyone doing 20% or more of his business with himself from becoming an agent. BTD's, which would write tickets almost exclusively for their corporate owners, cannot, then, become agents. [258]

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[255] IATA Resolution 802 §C(5).

[256] We should note that one court has struck down similar restrictions between horizontal competitors. U.S. v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

The 20% rule is complemented by another provision, the common control rule. It precludes conference members from paying commissions on air transportation sold to any person who has a financial interest in the agent, any owner, partner, officer or employee of the agent, and any owner, partner, officer or employee of any entity which owns, controls or has a financial interest in the agent. [259] As a result of the "common control" rules, an owner of any agency, whether it be a corporation or another person, is precluded from taking a commission on a ticket his agency writes for his own use. Commissions on such sales are prohibited even though the agent will have performed all the services for which commissions are normally paid and the airline will receive the benefit of those services.

DOJ and NPTA make general arguments that such anti-BTD restrictions should be disapproved as anticompetitive. In their view, BTDs are the functional equivalent of travel agents. Some corporate customers prefer using the services of BTD's rather than travel agents and some carriers might, if given the choice use them. American Express challenges the common control provisions, but not the 20% rules.

ATC and IATA, as well as most of the travel agent parties, argued, and Judge Yoder agreed, that BTDs are really purchasers of air transportation and cannot be considered agents within the meaning of the term as used in the conference programs. Moreover, it is argued that corporations already have the means to reduce their travel costs. Parties cite our decision in the Tariff Flexibility Rulemaking, ER-1246, 46 FR 46787, September 22, 1981. In that proceeding we concluded that air carriers could negotiate with individual purchasers on the prices they would charge for domestic air transportation and that such fares need not be filed with us in carriers' tariffs. Parties argue that, as a result of that proceeding, corporate purchasers, including those with BTD's, are free to attempt to persuade air carriers to grant them discounts on the basis of the volume of air transportation they purchase or the ticketing and reservations services BTD's perform. The fact that few discounts are currently offered only reflects the airlines' conclusion that such discounts are uneconomic. These parties argue further that airlines should not be forced to grant corporations discounts by making BTD's accredited agents.

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[257] Unlike travel agents, however, they will use the ticket stock of individual carriers in writing tickets, rather than the blank standard stock that agents use. BTD's settle accounts with air carriers directly, rather than through the ASP. The terms of settlement are individually negotiated with air carriers. Generally, BTD's report sales twice monthly. Because of the use of the Universal Air Travel Plan, which is essentially a credit card for frequent travelers, payment for transportation issued by BTD's occurs as much as 60 to 90 days after tickets are prepared. Nelson (Eastern) 47 Tr. 105-106.

[258] The rule does not preclude an agency from doing more than 20% of its business with one person. Travel agencies located on customer premises clearly do more than 20% of their business with one person. Rather, the restriction is aimed at writing tickets for one's own use, as a BTD does for its corporate owner. ATC Resolution 90.3 §IV.A; IATA Resolution 802 §C(5).

[259] The rules provide an exception for sales to employees for their personal use. ATC Resolution 90.3 §XXIC.8, IATA Resolution 802 §6(7)(8).

Our decision on whether the BTD provisions should be approved is complicated somewhat by our actions with respect to exclusivity. Viewing the record in this case, it appears that these provisions, coupled with exclusivity, have operated in the past to unreasonably restrain competition. However, we at the same time do not want to force carriers to compensate BTD's as agents when individual carriers may be unwilling to provide discounts directly to corporate purchasers.

We have therefore decided to grant approval to the present BTD restrictions until December 31, 1984. During this period, we expect that the marketplace will adjust to the new freedoms afforded by elimination of exclusivity. It is entirely likely that common standards specifically designed to define the marketing role of accredited agents would not be found to be anticompetitive after this period of transition. There are some suggestions that the present rules are overly broad to accomplish legitimate marketing objectives and carriers may wish to reconsider the specific formulation of standards in this area.[260] Carriers will have an opportunity to evaluate these restrictions in light of the objections that have been raised and changes that will occur over time in the marketplace.

Our legal framework for the analysis of the BTD restrictions is essentially the same as our discussion of exclusivity.[261] The agreements constitute a concerted refusal to deal with a certain class of persons. Because the excluded class is on a different level in the chain of distribution and not directed at competing air carriers, it should not be treated as a classic group boycott. Under a rule of reason analysis, the purpose and effect of the rule must be examined. If excluded persons have other avenues available to them in the marketplace, exclusion from one

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260/ *See* Wilson (OZ) 45 Tr. 163-164, Nesbitt (Co) 48 Tr. 105-106. *See also* Wilson (OZ) 45 Tr. 135 and Bessel (ASTA) 69 Tr. 52-55 on the similarities of BTD's and in-plants.

261/ Where a court finds that an agreement produces procompetitive efficiences, individual restraints must be necessary to obtain them and not place a greater restraint on competitors than necessary to achieve those benefits. *See*, pages 27, 38 and 41-42, *supra*.

sourse of supply may not have a significant adverse effect on competition. 262/

ATC and a number of other parties maintain that BTDs are not really agents, but purchasing departments for their corporations, and that elimination of the rule will force them to deal with purchasers as agents. They cite principles of common law to the effect that agents cannot deal for their own account. We need not dwell on common law principles of agency for, even then, agents could deal for their own account with the permission of their principal.

An individual decision not to deal with a purchaser on the particular terms it demands is clearly permissible under the antitrust laws. If an individual carrier believed the payment of commissions to persons who wrote tickets predominantly for their own use was uneconomic, it could therefore refuse to pay such commissions. However, because an agreement among virtually all major airlines operating in the U.S. not to deal with such persons precludes their entry into travel agency marketing, it is suspect under antitrust standards.

The common control rules involve a joint carrier decision not to compensate some types of sales. For that reason, we disapproved other carrier agreements fixing the compensation they would pay agents, including provisions prohibiting commissions on other types of sales. 263/

The provisions were historically justified on the public interest ground that it was necessary in order to prevent illegal rebating. At one time, a fare that was not contained in a tariff was an unlawful rebate. In domestic air transportation, we have substantially curtailed air carrier tariff filing obligations 264/ and it will be eliminated by statute in less than a month.

262/ See pages 47-48, supra. As in the case of exclusivity, court decisions that upheld application of standards to deny access or exclusive arrangements are not on point. In those cases the restraint was either found necessary to the cooperative venture, e.g., Deeson v. PGA, 358 F.2d 165 (9th Cir. 1966), or competitive alternatives were readily available. e.g., Oreck v. Whirlpool, 579 F.2d 126 (2nd Cir. 1978).

The restraint is not necessary to maintain the economies of the programs after the transition period. The cost of accrediting and administering an additional agent is not so great that doing so for BTD's will substantially increase the administrative cost of the program. Nor would eliminating the rule necessarily cause carriers to withdraw. See testimony of witnesses cited at n. 260, supra.

263/ Orders 78-8-87, August 17, 1978 and 80-2-33, February 5, 1980. See U.S. v. Socony Vacuum, 310 U.S. 190 (1980) (any restraint tending to stabilize prices is unlawful). Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (agreement fixing credit terms held unlawful despite absence of agreement on price itself.).

264/ ER-1246, 46 F.R. 46787, September 22, 1981.

With deregulation, we recognized that carriers should be free to charge passengers in relation to the costs of the individual transaction. [265] Under this policy, carriers could compensate persons who provide ticketing and reservations services or any other cost that air carriers would normally bear, even if the transportation is used for their own purposes.

The IATA rule on sales to affiliated persons has been justified as a means for carriers to insure that persons do not receive a lower fare because of commission payments on travel they purchase. In other contexts, we concluded that even as to international air transportation, compensation of persons for the services they perform really falls outside of the conduct section 403 was intended to prohibit. We decided that cargo shippers could be compensated for preparing their cargo to be shipped and that the net price actually charged them for shipment need not be stated in tariffs on file with us. [266] Moreover, we have permitted carriers to provide free and reduced rate transportation to agents without filing special tariffs and to provide free and reduced rate transportation to any customer in exchange for goods or services. [267] Under our current policies and rules, payment of commissions on affiliated sales are not rebates nor would carriers be required to file a special tariff rule to implement them.

Parties also argue that there are other avenues open to corporations, specifically the opportunity to obtain direct discounts. This observation alone is not sufficient to find on the basis of the record that the BTD restrictions are not anticompetitive.

As currently applied, even companies like American Express, which no one has suggested is not a legitimate travel agent, cannot make a profit on sales to itself. Profits on self-dealing are accepted as a legal and economic matter in all facets of commerce. [268] No compelling case has been made for permitting a group of competitors to combine to preclude such profits for an indefinite period in this industry.

We are also concerned that the 20% rules exclude certain persons who may wish to become accredited agents and comply with all other standards governing travel agencies. Although most corporations probably do not wish to be come agents, others may see air transportation marketing as a profit making opportunity.

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[265] See 14 C.F.R. 399.36, PS-93, 45 FR 36062, May 29, 1980.
[266] 14 CFR 399.86, PS-86, 44 FR 45609, August 3, 1979.
[267] 14 CFR 223, ER-1181, 45 FR 46801, July 11, 1980.
[268] In unregulated industries, a firm may establish or acquire a company with the view toward reducing costs through the integration of functions. There is no prohibition on earning a profit from sales to the parent company.

A company which is a heavy user of air transportation but which wants to enter the travel agency business and generally deal with the public is prohibited from doing so and, at the same time, using its own agency's services. [269]

Because of the industry-wide nature of the agreements, large users of transportation are thus inhibited from becoming agents. To some extent, the collective decision on these standards relate less to the function that a travel agent performs and more to the ownership of the agency. In many respects, the functions performed by BTD's are comparable to those performed by in-plants. In-plants are currently exempted from ATC's personnel requirements as well as the requirement that they be open to the public. Thus, in-plants could be staffed by the same people that staff a BTD. As a result of the Board's decision in the Transmark case, in-plants are free to reimburse customers for shared employees and most in-plants do so. Agents have set up in-plant agencies by taking over activities of BTD's using the customer's BTD employees. In addition many in-plants, like BTD's, are limited to providing services for official travel only and do not service pleasure travel needs of their employees.[270] BTD's like in-plant agents, arrange intineraries, arrange hotel accommodations and provide ticket reissuance and related services. The only practical difference is that a customer owns the BTD, but cannot own the in-plant. The carrier agreements in this area therefore appear to restrain entry unreasonably, given the practices that are now an accepted part of the agency program.

Some parties have argued that the BTD restrictions are necessary to maintain the competitive benefits of common accreditation. This argument rests on the assumption that if BTD's can get commissions, the loss of sales to agents will be so great that large numbers of agents will be forced out of business. If this happens the agency network will shrink substantially reducing the consumer carrier benefits that are associated with the existing system.

We do not believe that any dislocation will lead to such a substantial reduction of the agency network. Obtaining accreditation will not be without costs to the BTD. It will have to obtain personnel to meet ATC's standards as well as providing a bond and meeting ticket security requirements. Moreover, they will lose the benefits of generous credit terms as they go to weekly reporting under the ASP. For many corporate users of transportation these costs may outweigh the benefits.[271]

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[269] The 20% rule could be applied to foreclose entry completely if the agency wishes to do more than 20% of its business with itself. The common control rule will prevent it from earning revenues on sales to itself, even if the sales amounted to less than 20% of its own business.

[270] Bessel (ASTA) 69 Tr. 52.

[271] Under existing settlement rules, BTDs would have to remit payment on tickets they write eight days after the end of the weekly sales cycle. BTDs, at the present time, generally have a much longer period before payment is due. BTDs would, then, loss the "credit float" they now have if they became agents, NPTA-R-1 at 3. See also, Nelson (Eastern) 47 Tr. 105-106.

In 1978 only 18% of travel agents that handled corporate accounts dealt exclusively with large corporations. The remainder dealt with medium and small corporations or combinations of all three. 272/ Moreover the larger agencies tended to deal more predominantly with larger clients. 273/ Given the costs of becoming accredited, accreditation is likely to be more attractive to only the larger users of air transportation. But these customers would be dealing with the larger travel agents who are best equipped to offer attractive alternatives to BTD's contemplating accreditation.

Predictions in the record on revenue shifts if BTD's are accredited also suggest that no great contraction will result. ASTA estimated that BTD-handled sales would increase by $250 million over what they handled without being accredited out of total sales of $18.6 billion (based on 1979 sales figures) or 1.3 percent. 274/ Assuming that agents had only 50 percent of domestic sales and that all the transfer came from sales previously made by agents, this would result in a loss of at most two percent of agency sales. 275/

While we find that the operation of the present BTD provisions may unnecessarily exclude some persons who wish to distribute air transportation, elimination of these provisions at this time could unnecessarily distort the functioning of the agency programs. Alternative means for BTD compensation that are not now available could evolve as a consequence of our decision to eliminate exclusivity and our relatively recent determination that corporations may receive discounts.

To the extent that BTD's are only seeking price concessions to reflect the value of their ticketing services, these are permitted under existing policies. 276/ Whether or not they are granted is a matter to be resolved between air carriers and individual purchasers. In addition, the phased removal of exclusivity will allow BTD's to attempt to persuade airlines to compensate them for their services outside of the accredited travel agent system.

If we were to remove the BTD restrictions immediately, large numbers of persons who have not obtained direct price concessions in the past

272/ ATC-T-17 at 6.
273/ Id.
274/ ASTA-20 at 111. See also NPTA-T-1 at 24.
275/ These assumptions are more favorable to the argument than is probably really the case. To the extent that agents have a larger share of domestic sales and hence a larger dollar total, the $250 million will be a smaller percentage of the sales. In addition, we cannot predict that all of the BTD's increased sales would be at the expense of agents. Some could be at the expense of airline sales though ticket offices or tickets by mail.
276/ *See* pages 79-80, *supra*.

because of our regulatory policies, could attempt to gain agency status regardless of their interest in operating retail sales outlets. The real interest of many corporations and other larger purchasers of air transportation is to obtain volume discounts or other direct price concessions because of the special cost characteristics of their dealings with airlines. But for our fare policies they might have obtained such discounts directly and would not now be attempting to force air carriers to grant them by seeking changes in the agency programs. With our adoption of a new policy statement on discrimination and the tariff flexibility rule we have eliminated obstacles to direct price concessions. However, those changes occured recently and the market place has not had time to respond. Moreover, BTD's as agents would have no guarantee that they would actually obtain commissions. Air carriers could still individually decide not to compensate persons who deal primarily on their own account. There are already mechanisms within the ATC and IATA programs that allow a carrier to refuse to appoint an approved agency. 277/

We prefer to give the marketplace a chance to work to correct these potential distortions. This approach will preclude the entry of persons that do not really want to become agents. Consequently, we find that the ATC and IATA 20% rules and common control rules should be approved until December 31, 1984 because they are necessary to insure a smooth transition to the deregulated environment. We find that a transition period will serve public benefits that justify approval of provisions that might now be regarded as anticompetitive. The future legality of the BTD restrictions, in large measure, turns upon the existence of alternative trading opportunities. If there are alternate means to accomplish the same objectives, exclusion from dealing with parties to the agreement does not substantially reduce competition. Their effect on competition will depend on the structure of the marketplace at that time. Carriers may find that our approval and antitrust immunity are not required and they may choose to continue this type of restriction.

Because the rules now seem overly broad, carriers may in the interim wish to explore less anticompetitive means to accomplish their purposes. For example, carriers could collect information on the amount of self-dealing an applicant would do. Individual carriers could then decide whether or not to deal with that agent. A carrier could also choose to pay a given agency a different commission level than other agencies. At the present time, in-plant locations earn 3% commissions while other locations earn 10%. Therefore, retention of the 20 percent rule is not necessary to retain in the program carriers that would individually choose not to compensate BTD's as agents. Exclusion of BTD's that are willing to meet the standards of the programs would therefore not seem necessary to their continuation.

277/ Notice of denial of appointment or withdrawal of appointment has the effect, under current rules, of foreclosing the use of another carrier's validation plate to write tickets involving transportation only on the non-appointing carrier. When a non-appointed carrier is included on an interline itinerary, no commission is paid on that segment. See ATC-IR-72.

We conclude, therefore, that the 20% and common control rules may tend to lessen competition. Nevertheless, as discussed above, we will approve them for a two year period to allow changes in our regulatory policies to take effect and to preclude distortions of the travel agency programs. [278/] During this time, carriers can determine whether to keep the existing rules or modify them in response to the demands of the antitrust laws.

278/ For the same reason, we will approve for a two year period the ATC provision that precludes any customer of an agency from having an ownership interest in an in-plant agency. ATC Resolution 90.3 §XVI.C.3. This provision is founded on essentially the same considerations as the common control and 20% rules.

B. Carrier Commissions

The ATC agreements currently prohibit member air carriers from paying another carrier a commission.[279] Judge Yoder believed this provision should be disapproved on the ground that it requires major carriers to subsidize transportation sales to lesser carriers. Hawaiian Airlines and Aloha Airlines have filed a combined brief opposing this change. They argue it would have extremely adverse consequences for small certificated air carriers. Because larger carriers write more tickets for smaller carriers than smaller carriers write for larger ones, the payment of commissions on such tickets would be a substantial revenue drain on small carriers. In addition, they argue that the revenue transfer will give larger carriers an unfair competitive weapon. The carriers state that the impact will be particularly severe on them because so much of their traffic is generated on the mainland.

American Airlines responds that there is no justification for the provision in the record. It argues the provision is anticompetitive because it sets commission rates at zero. Moreover, the absence of a comparable provision in the IATA agreements makes it clear that the provision can be eliminated without adverse effects. American also maintains the agreement does not even apply outside the continental U.S. so that it does not now protect either Hawaiian or Aloha. With respect to obtaining an unfair advantage, American replies that the existing agreement, in effect, provides for cross-subsidization of smaller carriers' ticketing costs by larger carriers.[280]

We conclude that the ATC restriction on the payment of commissions to other carriers may serve some purpose in facilitating interlining between air carriers. As we have already noted, however, the efficiencies of the passenger agency agreements are separate and distinct from those of the interline agreements.[281] The extent to which air carriers interline with one another, and whether there is a payment for doing so, should be left to the negotiations process. For that reason, the carrier commission provision should be eliminated from the passenger agency agreements. In view of the fact that we have provided for a two year period for carriers to modify interline agreements, we will also approve the carrier commission restriction until December 31, 1984.

C. The IATA Airport Restriction

BDA, American Express, AAA, ARTA, ASTA, DOJ and DOT challenge the IATA provision which forbids the location of a travel agency on airport premises.[282] They maintain it represents an unreasonable restriction on the ways in which a travel agent can conduct its business and denies the public a wider choice of outlets from which to purchase air transportation. IATA supported the provision on the grounds that it precludes the unnecessary duplication of carrier services at airport locations.

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[279] ATC Resolution 90.3 §XXI.L.

[280] Major carriers must raise their prices to cover unreimbursed costs, while smaller carriers can charge lower fares. The unfair advantage, then, goes to smaller carriers. AA Reply Brief to Board at 11-12.

[281] *See*, page 58 n.195, *supra*.

Judge Yoder concluded, and we agree, that the provision should be disapproved. We adopt his finding that permitting agencies to locate at airports will result in increased convenience to the public and increased competition in the distribution of air carrier services. It will allow travelers to obtain the counseling services travel agents frequently provide.

D. Ticketing Machines on Customer Premises

American Express would like the Board to disapprove the provisions of the ATC and IATA agreements that prohibit travel agents from placing unattended ticketing machines on the premises of corporate customers.[283] American Express compares ticketing machines to ticket delivery services agents now provide, except that ticketing machines would be faster and more convenient. A customer would only have to place a call to the travel agent and the ticket would appear in the machine.[284] Only air carriers can install ticketing machines at the present time. American Express believes this is an unnecessary restraint on their ability to compete. It rejects the notion that the limitations are necessary to maintain ticket security and to maintain inventory control. As long as an agent assumes the financial responsibility for the tickets, American Express sees no reason why agent sponsored machines should not be permitted.

ATC indicates that the fact that only carriers may engage in the practice is no basis for disapproval of the provisions. Each carrier would be assuming the risk of placing its own tickets in a given location, unlike the travel agent situation where hundreds of carriers would be put at risk by one agent. Without the prohibition, ATC maintains it could not continue to monitor ticket flows through travel agents to spot ticketing abuses or track down outstanding ticket stock when an agent ceases doing business.

Judge Yoder indicated that the provision should be approved. He concluded that its disapproval would result in the use of unstaffed, unapproved locations. This, he felt, would make it more difficult for ATC to monitor the use and security of standard ticket stock. It would also subvert the in-plant rules. American Express responds that these concerns can be alleviated by incorporating a provision into the resolutions requiring that ticketing machines be under the control of an agent operating from an approved location.[285] It also argues that the provision constitutes an unlawful collective restraint on travel agents' freedom to compete with carriers for commercial business.

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[282] IATA Resolution 802 §C(14). ATC eliminated its comparable restriction in 1979. IATA's members considered whether to eliminate its provision, but the effort failed because one carrier voted no. I.D. at 120.

[283] ATC Resolution 90.3 §XI.H. The provisions that require agents to do business only at an authorized location would also seem to prevent this practice. Rather than disapprove all the provisions that prevent the practice, American Express suggests specific language to be added to the agreements to accomplish that result.

[284] The machine would be travel agent activitated.

We have decided to approve the provision. ATC has shown that it has been able to limit air carrier losses due to travel agent fraud or default by requiring sequential use of numbered blank ticket stock.[286] ATC could not use this mechanism if travel agents were free to place portions of their ticket stock where they wished. As such, the provision is related to legitimate objectives of the program.

Judge Yoder also concluded that these considerations did not apply if a carrier's own ticket stock was used in an unattended machine. In his view, individual carriers should be free to decide whether to entrust their own ticket stock to an agent to be placed in unattended machines. He conditioned continued approval of the ATC and IATA agreements on the adoption of such clarifying amendments. While a flat prohibition on self ticketing machines seems to go further than is necessary to accomplish these objectives, we prefer that ATC and IATA review their provisions themselves and revise the rules to more carefully meet their objectives. We will not, then, condition our approval on the adoption of such amendments.

E. Common Carrier Exclusion

BDA asks the Board to disapprove the ATC provision that prohibits a person from becoming an agent if it is an officer or employee of a transportation company, or a common carrier, other than a tour bus broker or an air passenger charter operator.[287] The provision apparently has very little effect because virtually anyone who would be disqualified under this section is permitted, under ATC procedures, to create a subsidiary to be the nominal applicant. ATC makes no effort to look beyond the corporate structure and the rule is readily circumvented. Consequently, BDA argues the provision should be disapproved as inconsistent with the public interest.

Judge Yoder agreed with the Bureau and concluded that the provision should be disapproved. He found it is readily circumvented and that IATA has experienced no ill-effect by not having a comparable restraint.

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[285] American Express Brief to Board at 7.
[286] Saunders (ATC) 46 Tr. 59-65, Meinkoth (American), 56 Tr. 36-37.
[287] ATC Resolution 90.3 §IV.D.3.

ATC asks the Board to reverse the ALJ and approve the provision prohibiting common carriers from becoming agents. ATC argues that the provision is based on its concern about possible conflicts of interest, probably the possibility of an agency preferring its carrier owner. It states such conflicts can be satisfactorily isolated and identified if an agent were a separate entity subsidiary of the common carrier.

We adopt the Judge's findings. We can see no reason to conclude that a wholly-owned air carrier subsidiary is less likely to favor its parent carrier over other carriers than the air carrier itself. Moreover, differences in commission rates, bias in ticketing equipment and other factors all come into the decisionmaking process when an agent is choosing on which carrier, among those suitable to its customers, the passenger should be ticketed.

F. In-plant Rules

The ATC and IATA rules both provide that a travel agency can expand by adding "branch" offices. Generally a branch office must meet the same requirements as the home office except ATC does not require the posting of a new bond and IATA has imposed a smaller working capital requirement. 288/ An "in-plant" is a special kind of branch office under the ATC rules. It is a branch located on a customer's premises.

1. Re-instating IATA's In-plant Rules

In late 1979 IATA reformulated its passenger sales agency resolutions. Most of the changes were, IATA maintained, merely technical and not substantive. In this category of allegedly "technical" changes was a deletion of IATA's special in-plant rules. It was not clear, at that time, whether the changes would place additional burdens on travel agents. Taking IATA at its word, the Board approved the deletion of its in-plant rules insofar as it was consistent with the Board's standard for approval of agreements at issue in the pending Marketing case: that policy was to approve changes so long as the resulting agreement was not more onerous than the one it replaced. Because of the special concern that the changes would make becoming an in-plant more difficult, the Board indicated it would entertain petitions for reconsideration of its approval of the change if anyone was injured by it. 289/

288/ It requires $5,000 in additional working capital instead of $15,000.
289/ Order 80-7-112 at 5, July 30, 1980.

Some of the IATA in-plant rule changes were more liberal. 290/ but it was more restrictive in one important respect. It required in-plants to meet the personnel standards applicable to other agencies. That is to say, there had to be a person on the premises with two years managerial experience and someone with one year's ticketing experience. The ATC rules exempt in-plant locations from the open to the public and personnel requirements. 291/ As a result, it is much easier to become an in-plant agent under ATC rules. The IATA restrictions prevented a large increase in the number of IATA in-plant locations, while there was a dramatic growth in ATC in-plants. 292/

American Express, in its brief to the Judge, asked that we reinstate the prior IATA in-plant rules. In its view, the IATA change has produced a major problem, preventing the approval of three out of four in-plant applications. Travel agents, and corporate customers, apparently find the differing IATA standards confusing and troublesome. American Express indicated IATA is voluntarily trying to find ways to solve the problem. If IATA does nothing, American Express asks the Board to reinstate the IATA rules along the lines of those of ATC. AAA also requests this change.

Judge Yoder agreed that additional provisions concerning IATA in-plant operations are necessary. He indicated IATA should conform its resolutions to its practices in the approval of in-plants, or change its resolutions and practices. He would not, however mandate IATA conformity to current ATC in-plant procedures. 293/

While we agree that the IATA in-plant rules should be clarified, we will not require any changes in the IATA in-plant resolutions. We have already indicated in general terms, that basic personnel and location standards serve legitimate carrier interests. We believe that carriers should be free, given their legitimate interests, to make other changes in their programs they believe are desirable.

290/ In-plants do not have to be branches of a regular agency location as is required by the ATC rules. Also, there is no special "open to the public" requirement that might prevent an agency from receiving accreditation for a location on a customer's premises. An agency on a customer's premises is "open to the public" if any person on the customer's premises can purchase travel services there. It does not require the location to permit sales to persons off the street. Ruggiero (IATA) 57 Tr. 28, 63 Tr. 135-136.

291/ In submitting Resolution 90.3, ATC would have imposed personnel standards on in-plants and eliminated its open to the public exception. When ATC admitted that this would make accreditation more difficult, we disapproved the rule pending completion of this case. Order 80-8-161 at 4-5.

292/ While the number of ATC In-plant locations increased to about 168 between February 1979 and October 1981, Saunders (ATC) 43 Tr. 158, the number of IATA In-plants in the same period went from 11 to 59 in roughly the same period. Ruggiero (IATA) 57 Tr. 18.

293/ I.D. at 125. However, he would condition approval of the IATA agreements on the submission of clarifying amendments.

2. Require IATA to adhere to Trans-Mark

By Order 79-2-92 February 15, 1979, (Trans-Mark) the Board approved an agreement between an ATC agent operating on a customer's premises (i.e. an in-plant) and the customer corporation to share an employee. The "shared" employee would be carried on the customer's payroll, but would spend a portion or even all of his time working in the agency. The travel agency would reimburse the customer for the portion of his time spent on agency business.[294]/

Because employee-sharing reduces air travel costs and affords corporate customers more control over how air transportation marketing services are provided, they have become a very popular method of handling corporate travel. [295]/ After Trans-Mark the number of in-plant locations went from about a dozen in 1979 to 168 in the summer of 1981. [296]/

The Trans-Mark decision was reached at a time when the Board was still extremely concerned about rebating. The notion was that if a purchaser received even an indirect benefit not available to other passengers, it was an unlawful rebate under section 403. The argument was that the employee's salary was such an indirect benefit. The Board rejected that position and found that the arrangement would only result in reasonable compensation for the benefit gained from the use of the employee. [297]/

By its terms, Trans-Mark only applied to ATC in-plants, not IATA in-plants. BDA and NPTA now asks us to require IATA to adhere to Trans-Mark. BDA argues that this restriction, particularly because we have already found it not to be a rebate, is adverse to the public interest. NPTA maintains that there is no basic reason to prevent cost sharing for both international and domestic sales.

Judge Yoder concluded that there was no basis for requiring IATA to adhere to Trans-Mark, given his conclusion that IATA be free to reformulate its in-plant rules.

294/ To insure that compensation did not exceed the benefit gained, the Board placed a number of conditions on such compensation arrangements. In view of our decision in the Tariff Flexibility Rulemaking, the conditions we placed on employee sharing transactions are clearly no longer appropriate.

295/ Business Travel Departments (BTD's) afford corporations similar control over their travel arrangements, but since corporations cannot now earn commissions on BTD sales, they are more costly.

296/ Saunders (ATC) 43 Tr. 158.

297/ For the reasons discussed above, the ATC rule precluding an agent from paying a customer rent for space used and privileges granted on a customer's premises ATC Resolution 90.3 §XVI.D.1. is no longer justified. For that reason, we will disapprove the provisions in to that effect. ATC agrees the provision should be disapproved, as did Judge Yoder. I.D. at 123.

We do not agree that an IATA decision to eliminate special in-plant rules eliminates the need to consider the application of Trans-Mark to IATA accredited agencies. The IATA rules will, in any event, provide for the location of agencies on the premises of commercial customers. Those agencies may wish to take advantage of the freedoms of the Trans-Mark decision. It is clear that our current policies would permit an agency to share an employee with a customer without violating our rebating policies, even if the agency only sold international air transportation. As we noted above, we have permitted international carriers to compensate persons for providing services in connection with the transaction without requiring that a special price be filed. The same reasoning applies to an agency transaction with individual customers. For that reason, IATA cannot proscribe agent reimbursement of customers where the customers provide services or facilities to them.

3. The ATC Branch Office Requirement

There is one aspect of the IATA resolutions that BDA and DOJ believe is an improvement over its ATC counterpart. The IATA agreements do not require agencies located on customer premises to be branch locations. A location on a customer's premises can be a home office under the IATA rules, but not under the ATC rules. BDA and DOJ do not indicate, however, whether these new locations should be exempted from personnel standards. The reason ATC requires branch status is because ATC has exempted in-plants from the personnel requirements. In such instances, ATC wants a fully accredited agency standing behind the in-plant. Since IATA in-plants are subject to personnel requirements, they need not be branches.

Judge Yoder rejected the proposed modification on the ground that the provision prevented the establishment of captive agents, i.e., purchasers posing as agents. We will approve the provision although on different grounds. As we have already indicated, carriers' legitimate business interests justify standards in a number of areas. Given these areas of interest, the conferences should be free to impose unique standards as they choose on special types of agency locations. We conclude the requirement that in-plants be branches is within their area of discretion.

G. The Effect of the Board's Tariff Flexibility Rule

Our Tariff Flexibility Rule of September 1981 permits agents to charge prices less than those on file with the Board. However, we concluded that individual air carriers have the right to require their agents to adhere to the prices they set if they conclude that is in their economic interest. The choice must be an individual one. We specifically foreclosed joint

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298/ For the same reasons, we will not require that ATC clarify their agreement, to indicate what constitutes a single in-plant location. See I.D. at 122-23.

carrier decisions on this question and joint carrier action to enforce individual carrier decisions.[299]

Three provisions of the ATC agreements are attacked as inconsistent with our decision. One provision states that an agent shall not rebate so long as it is a violation of the law.[300] American Express argues it should be disapproved because it may obligate agents not to rebate, despite the exemption in the tariff flexibility rule that legally allows rebating. DOT believes it should be disapproved in order to remove obstacles that prevent agents and carriers from entering into pricing and marketing relationships different from those prescribed in the ATC agreement.

ATC responds this is merely a restatement of the law. In any event, it indicates its intention of eliminating it on January 1, 1983. Judge Yoder recommended it be approved, since it was expressly coextensive with the law.

A second provision that is attacked as inconsistent with tariff flexibility is that agents shall comply with all instructions of individual carriers. It also states that the agent agrees to adhere to and comply with the tariffs, rules and regulations of carriers.[301] BOA argues that it may be used to compel agent adherence to a carrier's pricing instruction. This section in conjunction with one that terms a sale at less than tariff prices an "irregularity,"[302] would appear to require the ATC Travel Agent Administrator to withdraw all traffic documents and all air carrier plates from an agent if an agent acts contrary to one carrier's instructions.

ATC essentially agrees with BOA that collective enforcement of the "rebating", "tariff adherence" and "irregularity" provisions would be inappropriate. However, since the provisions relate to many matters beyond enforcement of individual carrier pricing decisions, it asks that the Board not disapprove them. Rather, it suggests they be approved subject to the condition that ATC shall not enforce individual carrier pricing instructions. It states that it does not intend to do so in any event.

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[299] See Order 81-9-167 September 30, 1981 at 2. denying petition for stay of Board's tariff flexibility rule.
[300] ATC Resolution 90.3 §VII.X.
[301] ATC Resolution 90.3 §VII.J.
[302] ATC Resolution 90.3 §XIV.A.6.

Judge Yoder concluded that the provisions should be modified to conform to our tariff flexibility decision. He found that we should require §VII.J to be amended to provide that agents comply with price tariffs only if so instructed by individual carriers or required by CAB regulation. He would revise §XIV.A.6 to delete reference to collective action.

We will disapprove the provisions. As written they are inconsistent with our decision on tariff flexibility, even though they may not be applied in a fashion contrary to our decision, or be revised to be consistent with it. If carriers wish to retain the provisions in a form modified to eliminate inconsistencies with our decision and that passes muster under the method of analysis we have devised here, they are free to agree to new provisions and submit them for our approval.

H. Control of Carrier Traffic Documents

BDA argued to the ALJ that several provisions of the IATA and ATC agreements have the effect of giving ATC and IATA a significant control over unilateral (as opposed to ASP) carrier/agent settlement processes. For example, ATC automatically withdraws carrier traffic documents (as well as standard documents) from agents who have defaulted on conference stock. They also remove carrier stock from agents who have violated the terms of the conference agreements. As with the exclusivity provisions, BDA believes these provisions deny carriers a choice in determining with whom and on what terms they will deal. 303/

IATA responded that its provisions are merely control mechanisms in the trust relationship between air carriers and agents. In its view, the provisions are incidental to the appointment process and should be approved. ATC answered that disapproval of the provisions would be warranted only if the exclusivity provisions are also disapproved. Even then, ATC argued some provisions should be retained.

Judge Yoder dismissed BOA's arguments as moot in view of his recommendation that exclusivity be approved. 304/

303/ ATC Resolution 90.3

Section II (definition of Traffic Document)
Section VI.C (penalties for failure to comply with rules concerning change of ownership of agency)
Section VIII.C., D., E. (reporting requirements, default and maintenance of bond)
Section X.H. (general authority to use carrier-supplied documents)
Section XI.B.C., F., H., J. (issuance of documents by carriers and use by agents)
Section XII. (security requirements for documents)
Section XIII.A. (maintenance of agent records)
Section XIV.A (inspection for agent breaches, and enforcement by Travel Agent Administrator and Director, Office of Enforcement
Section XXV.D. (termination of agreement with agent)

IATA Resolution 802

Section B (definition of Traffic Document)
Section E(1) (prohibits carriers from placing non-standard traffic documents with other than Approved Agents)
Sections FF(5), FF(7), FF(8), FF(9), FF(10), L(2), L(3), L(4), L(5)
and M(5) (penalties in response to agency infraction of the IATA rules)
Sections H(3)(c), H(3)(d) and H(3)(e) (restrictions on the ability of carriers to deal with an agency that failed to comply with rules concerning change of its name, ownership or location.)

304/ I.D. at 129 n.1.

In their briefs to us, BDA and DOJ raise their earlier arguments. They state that industry control over the use of individual traffic documents is inconsistent with our orders limiting industrywide control over a carrier's relationship with individual conference agents.[305] The rules require the return or withdrawal of all traffic documents in specific circumstances, including individual carrier stock.

ATC answers that certain provisions must be retained in any event. In support, it lists the provisions that state that identification plates, among other things, remain the property of the air carrier, that traffic documents be surrendered on demand, and that documents are given to agents for issuance at a specific location and may not be issued elsewhere.[306] ATC also indicates that the provision requiring agents to apply the same safeguard to individual carrier stock as standard stock should be approved. Carriers will want their individual stock to be as secure as standard stock.[307]

While BDA is correct that the conferences should not control individual stock, some of the provisions may legitimately affect ASP settlement as well as individual carrier/agent relationships. Accordingly,we will dissapprove the provisions only to the extent that they involve industry control over individual carrier traffic documents.

I. Compensation for Subsequent Applications

IATA forbids member carriers from compensating passenger agency applicants who have been disapproved or removed from accredited status within the past year.[308] The rule has been justified as necessary in order to prevent the unqualified applicant from continually reapplying in order to receive compensation for sales made during the pendancy of the applications.[309] Judge Yoder concluded that eliminating such unscrupulous practices was a permissible objective and found that the provision should be approved.

BDA attacks the rule as an unnecessary restraint on competition. In its view, it unnecessarily imposes a hardship on persons who wish to correct the problems that led to the disapproval of their first application. It asks the Board to compare this rule to the rule in the cargo area which, in its application, prevents compensation for a subsequent application only when the application is absolutely identical to the first.[310]

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[305] It cites Orders 79-11-18, 80-7-103 and 81-12-45.

[306] ATC Resolutions §XI.C, F., and H. respectively.

[307] ATC Resolution 90.3 §XII.

[308] IATA Resolution 802 §6(3)(b).

[309] Ruggiero (IATA) 62 Tr. 133.

We agree with the suggestion that IATA should attempt to limit the burden its rule places on disapproved applicants, perhaps as they have done with cargo. But it is also true that prospective applicants should bear some responsibility for the adequacy of their applications. IATA should be spared the burden of repeatedly denying the same application. For that reason, we conclude that the provision is not a substantial restraint on competition and leave it to IATA to make any changes it feels are necessary in the provision. We urge IATA to consider the revisions that have been suggested.

J. General Sales Agents

A General Sales Agent (GSA) is a special type of agent provided for in the IATA resolutions A GSA's primary purpose is to represent a carrier in thin markets far from the carrier's home country. Generally, GSA's are given control over their carrier principal's market decisions in their assigned areas.[311] The IATA resolutions impose few restrictions on GSA contracts, the primary one being that the GSA's territory be specifically identified and be its exclusive area.[312]

Usually, carriers select other airlines to be their GSA's. However, there is no requirement that a GSA be another air carrier and some GSA's are private individuals or companies.[313] During the course of the Marketing hearing, it was disclosed that a GSA could engage in the retail sale of air transportation on a carrier's behalf without being subject to the accreditation requirements of the IATA resolutions. Moreover, there is no limit on the number of GSA's a carrier can appoint.[314]

Because of these revelations, IATA proposed to apply the usual accreditation and retention standards to passenger and cargo GSA's. BDA opposed the amendments. BDA believed the primary purpose of the change is to reinforce the exclusivity rules, which it opposes and believes should be disapproved. Even if exclusivity remains, BDA believes the amendments should be disapproved because the primary purpose of GSA's is to function in place of direct air carriers. Carriers must know and have trust in and confidence in the persons they select to be their GSA's. The IATA amendments would, in their view, substantially limit carrier freedom in making their selection.

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[310] Ruggiero (IATA) 86 Tr. 27-29. The provisions of the IATA Cargo Agency Resolution that deals with compensation for applicants are §8(6)(a)(IV) of Resolution 803 and §8(a)(c) of Resolution 811. Judge Yoder would have required that the provision be modified to reflect current practice. We will not require the change. We prefer that IATA take action to limit its application.

[311] IATA-T-2 at 34-35.

[312] IATA Resolution 876a §12.

[313] IATA-IR-19.

[314] Ruggiero (IATA) 60 Tr. 72-74.

Judge Yoder found that the record did not disclose abuses of the general sales agent concept that required adoption of such an amendment. He would leave it to IATA to adopt such a provision. We will adopt his conclusions on this issue as our own.

Judge Yoder did not address another issue BDA raised with respect to the GSA agreements. They argued that provisions of the GSA resolutions that required that a single GSA be given an exclusive territory be disapproved. In its view, these provisions are prima facie anticompetitive in that they amount to collective market allocations. While there is no reason to foreclose individual carriers from establishing exclusive GSA territories, they contend that carriers cannot collectively do so.

We agree with BDA that the territorial exclusivity provision of the GSA agreements should be disapproved as a substantial restraint on competition. No one has suggested a way that competition is benefited by these agreements. In fact, they appear to do nothing more than restrain the circumstances in which carriers can deal with general sales agents. For that reason, we have decided to disapprove the provisions requiring passenger GSA's to have exclusive territories.[315]

K. Miscellaneous Provisions

Our discussions above address all the changes in the ATC and IATA passenger agency agreements that parties have argued should have been made or were improperly made by the ALJ. In addition, there are a number of changes the ALJ recommended, which no one has objected to that we will adopt as a part of this decision.[316]

These revisions are:

1. Removing the IATA restraints on agency compensation; IATA Resolution 802 §G(2) I.D. at 147-149. We will disapprove IATA Resolution 802 §G(9) to the extent that it prevents carriers from agreeing to allow an agent to retain remuneration paid on refunded tickets.

2. Approving changes in IATA terminology for airline-agent financial relationships; I.D. at 150-51. But we will not require that these changes be made.

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[315] IATA Resolution 876a §(12).

[316] In our orders addressing the issue of whether new resolutions or amendments to resolutions should have been consolidated into this proceeding, certain provisions were not consolidated. Most of those provisions have, however, been granted interim approval pending a final decision in this proceeding. See e.g., Orders 80-7-112, 80-9-161 and 80-10-94. We will address the issues of indefinite approval for those provisions and the conferral of antitrust immunity in an order to be issued in the near future.

3. Modifying the IATA Travel Agent Commissioner program; I.D. at 158-160. IATA Resolutions 802d and 802e.

4. Rejecting the evidence submitted by A.V. Costantini. I.D. at 52 n.1.

We now begin our examination of air carrier settlement systems, the third major category of agreements before us.

THE AGENTS STANDARD TICKET AND AREA SETTLEMENT PLAN AND OTHER SETTLEMENT PROCEDURES

A. History

In the beginning of the ATC conference program, individual agents settled with individual carriers directly. By the 1960's, the growing burden on agents of filing multiple reports and the administrative costs for carriers of auditing individual agent reports led ATC to develop a centralized settlement mechanism called the Agents Standard Ticket and Area Settlement Plan. The central features of the original plan, which remain in effect today, are the use of standard traffic documents and airline validator plates in lieu of individual carrier tickets and the submission by each agent of a single unified sales report for each reporting period covering sales on all ASP airlines.[317]

As originally approved in 1964, the agreement provided for reporting of cash sales three times a month and for daily reporting of credit transactions. Agents were still required to do a substantial amount of processing, including the transfer of ticket data to sales reports and calculation of remittances. In addition, the agreement provided for monitoring of agency reporting performance by ATC with a series of "demerits" or late remittance charges for irregularities.

Prior to the ASP, agents were required to report twice monthly with a five to seven day grace period. Under the original agreement submitted by ATC, the ASP would have required thrice monthly reporting with a two or three day grace period. ATC justified the change on the grounds that carriers would bear fully the costs of the new system and the efficiencies it produced would benefit agents as well as carriers. The carriers argued that they were entitled to recover their costs through improved cash flow. The Board agreed in principle but found that the cash flow to be produced by the schedule submitted by ATC would exceed the carriers' costs and was therefore not justified. In approving the agreements, the Board took the same approach as it had with other provisions, i.e. it weighed the additional restrictions of the agreements against the efficiency gains. We therefore required ATC to extend its grace period.[318]

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[317] ATC Resolution 90.10 embodies the agreement between air carriers generally referred to as the Area Settlement Plan. Under this heading we will also refer to the provisions of the ATC agreements dealing with travel agent participation, which may be found in ATC Resolution 90.3 §VII.

[318] Order E-20741, April 24, 1964.

Since its original approval, two categories of significant changes have occurred. One was in the procedures themselves. In 1974, ASP was modified to provide for computerized processing, with an increase in cash reporting frequency. This was accompanied by a reduction in paper work burden for agents and extended reporting periods for credit sales. (Order 74-8-81, August 21, 1974.).

The other category of change involves carrier participation. Shortly after the ASP was implemented non-ATC carriers recognized the benefits of centralized settlement through the ASP. In less than a year after the Board's original order, ATC submitted, and the Board approved, an amendment providing for participation by IATA carriers. (Order E-21497, November 14, 1964). Today carriers holding any form of authority from the Board authorizing scheduled service are eligible to participate. [319]

One of the most important questions in these participation cases has been the freedom of participating carriers to settle with ATC agents outside the Plan. Carriers originally had this freedom through the use of individual carrier stock. In 1975, however, the Board approved an agreement requiring ASP carriers to withdraw all individual stock from ATC agents, thus forcing carriers to use the ASP on an all or nothing basis. (Order 75-8-114, August 21, 1975).

By Order 78-3-63 March 15, 1978, the Board reopened its approval of the mandatory participation provision and ultimately disapproved it. ATC had argued that the efficiencies of the Plan were substantial and that any departures from the Plan would reduce the efficiencies. The Board rejected these arguments, and disapproved the agreement. It found that the mandatory participation was a restraint on competition because it reduced the freedom of competing carriers to negotiate settlement terms. It also found that the efficiencies of the ASP would themselves lead to its use, especially in an increasingly competitive environment. On that basis, the Board found that the mandatory participation rule was a restraint on individual carriers' competitive freedom to negotiate settlement terms which was not required to produce the efficiencies of the ASP. It could not be approved under section 412. [320]

B. Operation of the ASP

Under the ASP, agents are required to report and remit sales on a weekly basis. The reporting period runs from Monday through the following Sunday. The agent is required to report sales to its area bank by the Tuesday following each sales period.

There are six area banks in the U.S., each of which is responsible for agents in particular states. The area banks are selected by ATC under fixed term contracts and there have been some changes in area banks over the years.

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[319] See Orders 79-11-18, 19, and 20, November 1, 1979.
[320] Order 79-11-18, November 1, 1979, and the orders cited there.

The agent's sales report consists of an adding machine tape for cash transactions, a second tape for credit card transactions, underlying tickets and other documents, and a settlement authorization which specifies the amount which the area bank may draw on the agent's own bank. Tickets in the agents' hands are numbered sequentially and are to be used in sequence.

Once the area bank receives the report, it calculates the total amount owed by the agent by deducting commissions, which are indicated on traffic tickets from the sales price of the ticket. In addition the area bank calculates the amount owed to each ASP carrier.

The area bank will also prepare a detailed sales report for the agents and a summary report to airlines. On the Wednesday after a report is received, the area bank will draw on the agent's own commercial bank for the total amount owed by the agent subject to the settlement authorization, and it will credit the individual airline the amount due to it.

The ASP also monitors the agent's performance of its payment obligations. Reporting irregularities such as reporting a ticket out of sequence, returned checks, and failure to turn in a report result in the assignment of "late remittance charges." Accumulation of six such charges in any 12 month period results in review by the travel agent commissioner. If, upon review, the commissioner finds that the agent was at fault, the commissioner can impose penalties ranging from fines to removal from the accredited agency list.

C. Competitive Analysis

As with common accreditation, we examine first whether the concept of the centralized clearing house is, in itself, anticompetitive. We have concluded that it is not.

The clearinghouse mechanism produces substantial efficiencies for both agents and carriers. Carriers save the accounting costs of auditing thousands of agent reports because the Plan provides them with weekly sales reports. These cost savings can be quite substantial.[321] The cost savings also facilitate new entry because the costs of supplying new agents with validator plates and having them report through the ASP is much lower than\the cost of processing a new agent's sales report individually.[322]

The agent enjoys similar costs savings benefits. It is required to file only a single report as opposed to filing reports for each carrier on which it has sold transportation. Computerization further reduces the reporting burden for agents.[323]

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[321] See I.D at 172, See also ATC-ASTA-20 at 57, 58 and JRC(CO)-T-2. ATC-JRC (EA)-14 indicated that the cost to Eastern per ticket is 18¢.

[322] Meinkoth (American) 56 Tr. 38-39. See also AA-RT-2a and 3. American indicated that it would not give stock to every agency that currently holds its plate if the ASP were eliminated. Thus, to the extent it increases the number of distribution outlets, the ASP facilitates actual and potential competition.

[323] ATC-T-1 at 10, ATC-T-2 at 44, 54, AAA-T-1 at 2-3.

In short, the ASP clearinghouse produces efficiencies which are recognizable under our competitive analysis. We conclude that the concept itself is not a substantial restraint on competition.

Indeed, no party has seriously challenged the concept for a settlement clearinghouse as anticompetitive in this proceeding. Numerous clearinghouses exist in other industries and air carriers maintain separate clearinghouses for intercarrier settlements. [324]

Having approved of the concept of the ASP, we must also consider particular provisions to assure that they do not involve restraints which are unnecessary or excessive to achieve the competitive benefits of the ASP.

D. Particular ASP Provisions

Competitive questions have been raised regarding two aspects of the ASP. ARTA has challenged the fixed reporting and remitting schedules. Secondly, DOJ has raised the question of access to the ASP by non-accredited retailers.

1. Reporting and Remittance

The ASP requires all agents to report sales on a weekly basis and provides for remittance in the form of drafts drawn on the agent's commercial bank eight days after each report is filed.

As a means of enforcing these rules, ATC assigns penalties called late remittance charges for reporting irregularities as described above.

These rules were challenged by ARTA as an anticompetitive fixing of credit terms which is *per se* illegal under *Catalano v. Target Sales*. [325] ARTA also argued at one time that either of two modifications would eliminate the restraint. ARTA first suggested that the ASP only be permitted to process a uniform sales report and identify amounts owed to individual carriers. Carriers and agents would then set remittance periods individually and remittance could be accomplished through the ASP. Alternately, ARTA suggested that the ASP could be modified to provide a choice of weekly or twice monthly reporting and remitting. Although DOT questioned the rules establishing fixed reporting and remitting rules at earlier stages in the proceeding, it does not at this time. [326]

The ALJ rejected ARTA's request, concluding that it would substantially reduce the efficiencies of the Plan, and lessen the integrity of standard stock.

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[324] The Board disclaimed jurisdiction over the ATC airline clearinghouse in Order 2829, May 1, 1944.

[325] 446 U.S. 643 (1980).

[326] DOT commissioned a study of reporting and remitting alternatives to those in the existing ASP, DOT-401, and concluded that none were presently available. DOT Br. at 13.

We reject the argument that the fixed reporting and remitting schedule represents the type of agreement fixing credit terms that was found unlawful in Catalano. [327] The purpose of the ASP is fundamentally different. Under the ATC and IATA programs, funds collected by agents, less applicable commissions are held in trust by agents for the carriers. The settlement system is simply the means by which funds are transferred from the agent's account to the carrier's account. Parties have argued that the ASP is not an appropriate mechanism to use for extension of credit. Furthermore, carriers are free to negotiate credit terms with agents outside the ASP.

Although the fixed remittance schedule is not a credit fixing agreement, it is nevertheless a restraint on carrier practices which may have competitive implications. As we observed in disapproving mandatory participation rules, the fixed terms do restrain carrier freedom to negotiate settlement terms in conjunction with other elements such as commissions to develop an agency relationship which best meets its needs. Although agents hold money in trust, agents use this money while it is in their possession [328] Thus, standard remittance terms could have economic and competitive significance and the fixed terms would interfere with normal market forces in the development of agency relationships.

We must therefore consider whether the restraints embodied by the fixed reporting and remitting schedule are necessary to produce the efficiencies of the Plan, and whether they are the minimum necessary to achieve these objectives. We conclude that they are.

The ASP produces efficiencies in two distinct areas. The first is in reporting and the second is in collection.

The reporting function of the ASP provides its basic benefits, and no one challenges that portion of the plan. It significantly reduces the paperwork burden on agents. Agents prepare one report for all ASP carriers instead of separate reports for each carrier on which it wrote tickets. There are currently over 120 carriers participating in the ASP. In fact, in approving the mechanized reporting system, the Board found that the cost savings to agents in not being required to calculate amounts owed individual carriers justified an increase in reporting and remitting frequencies.

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[327] The agreement that was found unlawful contained a standard payment period during which buyers could make payments and receive a discount and also a period in which delayed payments could be made without incurring interest charges. The Court found that these kind of credit terms were so intimately connected to price as to bring them within the ambit of standards developed for price fixing agreements, i.e. that they were per se unlawful. It also found that the purpose of the agreements was to reduce competition in the extension of credit terms. 446 U.S. at 648-49.

[328] See pleadings of ARTA and ASTA in Docket 30933 and Order 78-6-210, June 30, 1978 therein, relating to proposed ATC agent's standard finance statement.

If the ASP were limited to a reporting function only, individual carriers would have to take up the collection function themselves. With 18,000 agents the cost could be tremendous.[329] Many carriers have indicated that they would be forced by costs to reduce the number of agents they appointed if the remittance features of the ASP were eliminated.[330]

The potential collection expense would be increased even further because ASP monitors agent performance of settlement obligations. A remitting irregularity means more than just the failure to forward all money already owed. By placing blank ticket stock which they freely accept in agents' hands, carriers expose themselves to the risk of providing air transportation for which they might never be reimbursed. The remittance features of the ASP also perform the function of monitoring agents' continuing ability to fulfill their payment obligations, and permit carriers to reduce their risk by removing ticket stock and plates when the likelihood of non-performance arises. Thus, if ASP were limited as ARTA suggests, carriers would individually have to shoulder the burden not only of collecting past due amounts, but also of monitoring continuing performance of agents to protect themselves from undue risk. Indeed, American indicated that the remittance and performance monitoring efficiencies of the Plan were so important that if ASP were limited to reporting, it would develop its own reporting and remitting program using its own ticket stock as a more cost effective alternative.[331]

Introduction of variable remitting would likewise endanger the efficiencies of the Plan. The ASP would undergo substantial increases in monitoring costs, especially if an agent were on multiple remitting frequencies for each sales report. Carriers would likely have to increase their own monitoring and auditing efforts since the reliability of the ASP might be reduced.

Finally, having determined that it is reasonable for the ASP to contain fixed remittance schedules, we must consider whether the particular schedules are reasonable.

The existing schedules were implemented in conjunction with the computerization of the ASP.[332] The schedules were viewed by the Board as a reasonable "cost" to agents who obtained the benefits of simplified reporting and detailed marketing information which would result from computerization, especially since the ASP carriers were to bear the additional cash expenses of computerization. In fact, the schedule was developed after carrier consultation with agent groups.

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[329] ATC-RT-6 at 5-6, Nelson (Eastern) 47 Tr. 140; AAA-T-1, pp. 2-3.

[330] Meinkoth (American) 56 Tr. 32-34, JRC(OZ)-T-1 at 4, (Wilson (Ozark) 45 Tr. 174-175, AA-R2 at 2, 3. See also Wilson (Eastern) 47 Tr. 143, Knodt (ASTA) 68 Tr. 95-102.

[331] Meinkoth (American) 56 Tr. 38-39.

[332] Approved by the Board as reasonable in Orders 74-8-41, August 7, 1974.

The schedule has been in place for some eight years now. On the basis of information in the record, it does not appear to be onerous. Relatively few agents have been removed from the agency program because of financial defaults.[333]

Under these circumstances, we conclude that the existing schedule is reasonable.

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[333] In 1979 agents were sent 6,662 letters with regard to reporting or settlement irregularities. Of those, 3,252 dealt with out-of-period reported tickets, 185 concerned failure to report, 2,063 were for untimely reporting, and 1,162 were for dishonored checks. ATC-T-2 at 21. But there were only 375 voluntary and involuntary deletions from the ACT agency list. ATC-IR-7.

2. Access by non-accredited agents

DOJ has argued that the ASP is a substantial restraint on competition unless it is opened to non-accredited marketers. It argues that the efficiencies of the ASP are so great that no alternate marketer could hope to compete effectively on a cost basis with conference agents. The higher settlement costs would severely undermine any other cost advantages that the alternative marketers might have.

The administrative law judge declined to require that access to the ASP be opened. Having approved agency exclusivity, the ALJ concluded that no "non-agent" retailers could be identified that were interested in using the Plan and that imposition of security provisions for "non-agent" ASP participants would either vitiate the existing accreditation system or give rise to a parallel one for non-accredited retailers.

ATC responds that it has no agreement that bars non-agent retailers from the ASP. It says it has never denied any retailer access to the Plan and cites its recent acceptance of agents accredited only by IATA. ATC also argues that the DOJ position is based upon no more than an unsupported allegation that carriers will not deal with persons who are denied access to the ASP. Action requiring ATC to accept other retailers would have to be supported by substantial evidence. They claim no evidence exists to show that a retailer who might use the Plan has been denied access.

We have not found a provision that restricts non-agent access to the ASP. As a result, no modification is required at this time. However, we agree with DOJ's conclusion that access to the ASP cannot be restricted in the future. Antitrust precedent clearly establishes that refusal to allow access to non-accredited retailers under reasonable terms would be a substantial restraint on competition.[334] ATC has implicitly recognized this point by not preventing non-ATC carriers from participating.

Our starting point is the proposition that a restraint on competition must be necessary to produce the efficiencies of a joint venture and can place no greater restraint on competition than is necessary to accomplish its objectives. If access to the ASP were denied, a new marketer could not obtain the efficiencies inherent in the ASP. Marketers desiring to enter the industry would be at a severe disadvantage unless they could duplicate these efficiencies by establishing an independent settlement system. Because the ASP is virtually industrywide in the U.S., the cost savings from avoidance of duplication are maximized and the costs to individual carriers of participating in the settlement program are minimized.[335]

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[334] *U.S. v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) and *Associated Press v. U.S.*, 326 U.S. 1 (1945).

Given the fact that ASP is in place, it would appear as a practical matter to be the only means of achieving settlement costs savings on a large scale in the U.S.

A number of cases under the Sherman Act provide that where a group of competitors control a facility or resource which is essential for effective competition, it is an unreasonable restraint of competition to deny access to the facility on reasonable terms to "outside" competitors.[336] While the issue is not carriers denying access to their competitors, the cases establish the need to be vigilant in assuring that agreements on access to essential facilities do not have the effect of restraining competition.

Judge Yoder concluded that if retailers can get access to the ASP and its costs savings they will have no incentive to seek accreditation. Our difficulty with this reasoning is that it ignores the fact that common accreditation produces efficiencies for agents totally unrelated to settlement costs.[337] The accredited agent will potentially have a much larger group of air carrier services which can be sold. Access to the ASP will not alone provide these benefits.

It is also argued that granting non-ATC/IATA agents access to the ASP will increase air carriers' risk of financial loss because unqualified persons will obtain blank ticket stock. However, carriers can impose restrictions to protect themselves against this risk.

The antitrust laws do not require access to essential facilities on any terms, but only upon reasonable ones. ATC currently has numerous rules pertaining to accreditation or ASP participation which are designed to minimize risk to carriers using the ASP. We believe that imposition of these requirements on nonaccredited retailers participating in the ASP would be reasonable.[338]

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[335] The record indicates that where an industry settlement program is in place, a duplicate is not likely to arise. Thus when IATA was attempting to develop central settlement banks in various countries, it did not establish one in the U.S., but sought access to the ASP. Order E-21749, November 14, 1964. By the same token, when ATC carriers sought a centralized settlement system for Canadian agents, they did not expand the ASP, but gained access to the IATA bank settlement system. Order 78-8-31, August 7, 1978. On the basis of the record it appears that small groups of carriers have established settlement programs independently of the trade associations only in areas where neither ATC or IATA have established an industry clearinghouse. See *e.g.*, Nelson (Eastern) 47 Tr. 121, Proctor (IATA) 64 Tr. 18, Salyer (IATA) 58 Tr. 79-80.

[336] *U.S. v. Terminal R.R. Ass'n*, 224 U.S. at .

[337] *See* pages 35-36, *supra*.

[338] ATC may require, for example, bonding provisions, ticket stock security requirements, and the fixed reporting and remitting sequence, as well as imposing penalties for non-adherence.

ATC need not, for example, deliver blank ticket stock to any person who indicates he intends to enter the marketing industry. Some form of carrier sponsorship provision might be reasonable, either in the form of proof of an agreement between a carrier and the unaccredited retailer or a statement by a carrier that it is planning to enter into such an agreement if the retailer gains access to the ASP. The premise of opening access to the ASP is that retailers desiring to enter into bilateral agreements with carriers have access to a low cost means of settlement. Moreover, in the absence of an agreement with a carrier, a non-retailer that gained access to ASP would have standard stock, but no validator plates. Thus the ASP would be required to keep track of potentially large amounts of "dead" inventory held by non-accredited retailers waiting for the possibility of negotiating a bilateral contract. [339]

Carriers are also placed at risk if ticket stock is stolen. If stock (and plates) are stolen, ASP participating carriers run the risk of honoring tickets written with the stolen materials, and their only recourse is to the agent from which the materials were stolen. [340] Where the agent has never received money for these tickets, that recourse may not be adequate. However, carriers have adopted specific requirements designed to reduce the risk of theft in the first instance.

The ATC rules specify the maximum number of blank tickets which an agent can hold at any one time. Of the total, they also specify the number which can be held on premises and require that these and plates be stored in safes which cannot be easily removed from the premises. [341] ATC requires proof that these rules can be met as part of its accreditation standards. [342] To provide additional incentives for adherence ATC also provides for waiver of the agent's liability if the agent promptly notifies ATC of the loss or theft, if the theft was not accomplished by an employee of the agent, and if the agent was in compliance with the security regulations at the time of the incident.

It would be reasonable for ATC to impose similar security provisions as a condition for access to ASP by non-accredited agents. The risk to carriers of honoring lost or stolen tickets would appear to be equal without regard to the type of retailer from which they were stolen.

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[339] This situation should be contrasted with our disapproval of the sponsorship provision in the *ATC Agency Resolution Investigation*. There, we were dealing with a condition on the very right to sell air transportation, and with evidence that it was being used to restrict entry for competitive reasons. Here we are dealing only with a settlement mechanism, and the existence of an actual or imminent contract with a carrier appears to be a reasonable element of the non-accredited retailers' ability to use it.

[340] Therefore, ATC might reasonably require a person wishing to gain access to the ASP to produce some evidence that an agreement exists or is imminent and require the expanding carrier to hold members of the Plan harmless from fraud or other misuse of blank stock .

[341] ATC Res. 90.3. Attachment B.

[342] See ATC Res. 90.3 §IX.6. providing that the agent is, in certain circumstances, liable for carrier losses as a result of lost or stolen tickets.

Extension of rules designed to combat these risks to unaccredited participants would therefore be reasonable. 343/

Carriers also face financial loss either when an agent either intentionally diverts funds from the carriers or is unable to meet its obligations because of incompetence. ATC has a variety of provisions designed to control these risks. Risks to the ASP can be minimized by adopting the same standards that now protect carriers from these threats.

First and foremost is the agency bonding requirement. Under the current rules, the bond is available to satisfy amounts owed to carriers when the agent cannot meet its ASP obligation whether through fraud or mismanagement. In the case of mismanagement, a non-accredited agent may pose a risk only to its appointing carrier. In the case of fraud, however, the risk may expand to other ASP carrier participants despite their efforts to prevent ticketing by the unaccredited retailer. Given these risks, a bonding requirement for non-accredited retailers would be reasonable. 344/

The other means by which carriers protect themselves against financial irregularities is through the reporting and remitting rules. Thus agents are required to report on a uniform schedule and to make funds available to ATC at a fixed period after each report. In addition, agents are required to file no sales reports if they have sold no air transportation during a reporting period. Finally, the standard tickets are distributed to agents in numerical sequence and they must be used sequentially. The failure to do so can result in a late remittance charge which in turn may lead to a review of agency status.

Many of these rules are directly related to the production of collection efficiencies inherent in the ASP and their application to unaccredited ASP participants would be justified on that basis. Some of them also reduce the risk to carriers from financial irregularities. Thus, the failure to report tickets in sequence may indicate an inability or an intentional refusal to remit all funds collected during the week. The inability to honor the ASP draft on the weekly remittance day could pose a financial risk to ATC participating carriers. Carriers clearly are not required to monitor for irregularities and take action to protect themselves only after a major breach has occurred. Application of these rules, including the late remittance charge provisions, with the threat of loss of the right to use the ASP, is reasonable under these circumstances.

343/ As to the requirements themselves, these were considered originally by the Board in Order 76-5-47, May 12, 1976. At that time the Board explicitly considered whether they imposed a burden on agents which was excessive in regards to the risk protection intent of the carriers and concluded that they do not. Nothing in the record of this case indicates that this conclusion is no longer valid, nor that security standards found reasonable for accredited agents are not reasonable for non-accredited agents with respect to ASP materials in their possession.

344/ The bond requirement must be reasonable in view of the potential risks. But it need not be identical in amount to that demanded of accredited agents.

While many of the terms and conditions relating to use of the ASP appear in the basic agency resolution, [345] it would be reasonable to impose the requirements on non-accredited retailers as conditions for ASP access. To the extent that ATC desires to do so, it may want to transfer these rules from the agency resolution to the ASP resolution or to duplicate them for application to non-accredited retailers. We will not require ATC to make such modifications at this time, relying on their representation that access is not restricted.

Our discussion of the reasonableness of imposing the various requirements on non-accredited retailers should not be construed as any type of requirement or endorsement for doing so, and by no means should they be construed as the Board's ruling on the minimum protection with which carriers should provide themselves consistent with the public interest under section 412. We have concluded only that imposition of these types of conditions, or any combination of them, would not be considered as a substantial restraint on competition.

D. IATA Settlement Provisions

The IATA Resolutions also contain provisions governing direct carrier agent settlement and related matters. The two most important areas covered are settlements outside the ASP and default procedures.

1. Non-ASP Settlement

IATA resolutions establish a settlement procedure for direct agent-carrier settlement outside the ASP. The procedures specify biweekly reporting and remitting. The resolutions permit carriers to establish alternate reporting and remitting cycles, but in no case can they be less than twice weekly.

The ALJ disapproved the provisions prohibiting more generous reporting cycles than the IATA specified rule. He concluded that the Board had previously disapproved restraints on outside settlement as contrary to the public interest, and that IATA had offered no justification for its restriction which had not already been rejected by the Board.

We will affirm the ALJ on this point. Agreements fixing settlement terms are restraints on competition as we have previously found. [346] While they may be justified as part of a centralized settlement system, because they contribute to efficiencies, they have no justification when standing alone. Our purpose in eliminating the mandatory use requirement for carrier participation in the ASP was to permit carriers the freedom to set settlement terms other than those specified by carrier agreement in the ASP.

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[345] Resolution 90.3 contains accreditation and retention standards while Resolution 90.10 relates specifically to the ASP.

[346] Order 79-11-18 at 5, November 1,, 1979.

The primary justification offered for the current rule is that it is necessary to protect carriers on whom agents write interline tickets from a cash flow crisis if transporting carriers demand their share of interline tickets before the ticketing carrier has collected from the agent.[347] This argument is a variation of the argument that the Board rejected in the context of disapproving the mandatory ASP participation rules.[348] IATA has presented no evidence to demonstrate that carriers setting their own settlement terms do not have the incentive or ability to protect their cashflow.

We will therefore disapprove the provision that precludes IATA carriers from offering more generous terms than that provided by IATA. We will not disapprove the IATA rules themselves. It is not a restraint on competition for IATA to establish procedures as guidelines or recommendation. The restraint comes from making the IATA provisions a mandatory minimum from which individual carriers cannot deviate.

2. Automatic Default Procedure

Several provisions of the IATA resolution require all IATA carriers to place an agent in default if a single carrier, using its own stock, places the agent in default.[349] IATA also provides for automatic collective default of a passenger agent upon default of a commonly-owned IATA cargo agent,[350] and for default to all IATA carriers if an agent is in default to the ASP. The ALJ recommended disapproval of all provisions requiring automatic conference-wide default and possible later adverse action based upon transactions using individual traffic documents, or removal of individual carrier stock based on defaults not involving that stock.[351] We affirm the ALJ.

As the ALJ correctly observed, when we have previously addressed this issue, in the context of the ATC agreement, we concluded that it was not in the public interest for the conference members to aggregate their economic power to take collective action against an agent where no collective danger exists. 352/

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[347] Ruggiero (IATA) 60 Tr. 157-64.

[348] Order 79-11-18 at 6, November 1, 1979.

[349] IATA Resolution 802 §FF (5)(a), (b), (c), (e).

[350] IATA Resolution 802 §F(6) FF(5)(d).

[351] Specifically IATA Resolution 802 §§F(5); FF(5)(a)-(e), (7)(a), (9)-(10); and L(2) (4).

The only justification offered for these rules is that a default to one carrier indicates a risk to all. As the ALJ correctly found, with the ASP in place and widely used, this justification is not sufficient. During the time before the ASP, when agents settled with all carriers directly, a default to one carrier could mean a risk to all if the agent were robbing Peter to pay Paul. With the advent of the ASP, however, this is no longer the case. If the agent is meeting its obligations under the ASP, it is by no means clear that a default to an individual carrier outside the ASP presents a risk of loss to any but that carrier. We are therefore disapproving the provisions calling for automatic collective action on the basis of defaults to individual carriers and conversely provisions requiring individual carriers dealing outside the ASP to place an agent in default automatically based on default to the ASP.

As in the case of ATC, however, we would not object to a provision specifying that collective action will be taken after an impartial finding that the default in question represented a risk to all carriers. Nor would we find it objectionable if IATA carriers informed each other of their individual default actions so that other carriers could take whatever individual action they deem appropriate. Likewise, provisions providing that default to the ASP is a default to all ASP participating IATA carriers is reasonable. In that situation the default clearly represents collective risk to the group taking collective action.

IATA CARGO AGENCY PROGRAM

A. Background and History

Originally, both IATA cargo agents and IATA passenger agents were governed under a single agency program. It was not until 1961 that a separate IATA cargo agency program was developed. 353/

ATC has no domestic counterpart to the IATA cargo agency program. Nevertheless, the IATA cargo agency program has "piggybacked" on the passenger agency programs. When innovations or modifications in the cargo program have appeared and were applicable to passenger sales, they usually appeared in the passenger agency program first. For example, IATA recently developed a Cargo Accounts Settlement System (CASS) inspired by the ASP. 354/ By the same token, the Board in reviewing the cargo agency agreements has generally applied the standards first developed in the

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352/ In Order 80-6-101, June 17, 1980, we prohibited automatic collective default based on a default to an individual carrier until after the travel agent commissioner had determined that such a default represented a hazard to all carriers' interests. Ultimately, ATC withdrew its provisions for conference-wide action. Order 80-6-101 at 4. See also, Order 79-8-134 at 6, August 24, 1979.

353/ IATA-T-1 at 4.

354/ See Orders 78-8-25, August 4, 1978 and 81-9-83, September 15, 1981.

passenger agency context. For example, in connection with its interim approval of the CASS program, the Board struck down the mandatory carrier participation rules.[355]

In many ways, the IATA cargo and passenger agency programs are similar. The cargo agency program provides for exclusive use of IATA cargo agents. It establishes standards for personnel, finances and locations. It also provides for establishing the responsibilities of the cargo agents to carriers. The standards and other rules, however, are sometimes markedly different.

For personnel, the cargo agreement requires only that the agent (which can include a corporation) has been engaged in promotion and sale of international air cargo transportation for six months.[356] There is no specific promotional experience requirement for owners or managers as individuals as there is for passenger agents. Similarly, there is nothing which corresponds to the one year technical ticketing experience requirement. Rather, there is a general requirement that the agent have personnel who are qualified to perform a variety of functions including quoting rates, accepting and delivering shipments to carriers, and collecting and remitting funds.[357] The only technical requirement is that personnel be qualified to handle hazardous cargo under IATA's hazardous cargo regulations.[358]

In the area of financial standards, the cargo agency resolutions require only that the agent have a satisfactory credit and financial standing[359] as opposed to the specific capitalization requirement in IATA's passenger agency program.

The locational requirements are also less detailed. The agent must have an office or a department in an office which is engaged primarily in the promotion and sale of cargo air transportation and handling consignments. In addition, the agent's facilities must be suitable for performing the various services outlined above in connection with personnel, including the handling of hazardous cargo.[360]

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[355] Order 81-9-83 at 3-5.

[356] IATA Resolution 803 §A(1)(a).

[357] IATA Resolution 803 §A(2)(c)(iii).

[358] IATA Resolution 803.A(2)(c)(v).

[359] IATA Resolution 803.A(1)(d).

The agreements also provide for the optional CASS settlement mechanism. Like the ASP, CASS provides for periodic submissions or unified sales reports and remittances from agents to CASS participating airlines.

As originally approved by the Board, the CASS agreements permitted IATA carriers not to use CASS, but an IATA carrier electing to use CASS was required to make all of its IATA agents use the system exclusively. In addition the Agency Resolution precluded non-CASS carriers from adopting more generous settlement terms than those provided for in CASS. While IATA was developing its experimental program the Board reconsidered its approval of these two provisions, and disapproved these provisions for the reason it used in the ASP participation case.[361]

There are two differences between CASS and the ASP worth noting. The first, which is a technical one, is that there is no equivalent to the standard agent's ticket, and airline validator plates. Rather, agents use carriers' individual airwaybills.[362] The second is that CASS explicitly provides for participation by non-accredited businesses, including shippers.[363]

8. The Cargo Agency Industry Today

There were approximately 880 registered IATA agents in 1979. However, the actual number of outlets is closer to 6000 because, unlike IATA's passenger agency program, cargo agents are not required to register branch offices.[364]

In addition, the structure of the market for freight retailing services is markedly different. In the freight area, alternatives to agents have existed since at least the 1950's and they are much more important. Forwarders have been acting as indirect carriers, setting their own rates and performing pickup and delivery service and document preparation. In addition, the Board has permitted shippers to perform their own retailing services and receive direct or indirect compensation from carriers.[365] The Board authorized cooperative shippers associations in 1956.[366] A cooperative shippers association is a group of shippers that pools its freight, performs other retail functions, such as paperwork or pick-up and delivery, and receives a discount based on the higher weight of the pooled traffic. More recently, the Board permitted shippers to receive fees from carriers for performing ready for carriage services.[367] Currently, the Board is considering permitting direct carriers to pay fees to indirect carriers without regard to the nature of the services performed.[368]

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[360] IATA Resolution 811.A(2)(c)(v).
[361] Order 81-9-83, September 15, 1981.
[362] Lindsay (IATA) 88 Tr. 73-74.
[363] See Order 81-9-83 at 5.
[364] See Whalen (IATA) 39 Tr. 136.

In short, cargo agents are subjected to a wider range of competitive

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365/ When the Board discontinued forwarder registration in 1981 there were some 1500 forwarders and shipper cooperatives. EDR-421 at 2, March 31, 1981.

366/ ER-202, April 13, 1956, 21 FR 2511.

367/ 14 CFR 399.86, PS-86, 44 FR 45609, August 3, 1979.

368/ EDR-427, 46 FR 35665, July 10, 1981.

alternatives. 369/ These alternatives provide an effective disciplining force on IATA accredited cargo agents.

C. Exclusivity

The IATA cargo agency programs contain exclusivity provisions that essentially duplicate those that appear in its passenger agency programs. 370/ Judge Yoder concluded that the exclusivity provisions of the cargo agreements are a necessary, integral part of the system and that they enhance competition in the air cargo transportation marketing industry.

BDA and IAAA argue that the cargo agency exclusivity provisions should be disapproved. As with the passenger agency program, BDA believes the cargo program will attract participants on its own merits. They submit that the argument that its elimination will erode the benefits of common accreditation is based solely on the premise that carriers will act irrationally. Cargo agents and air freight forwarders provide slightly different services. It is desirable, however, to have both statuses while dealing with the public and air carriers. In BDA's view, the exclusivity provision makes it marginally more difficult to attain agency status. IAAA maintains it is a compensation fixing agreement, fixing compensation to unaccredited agents at zero. IAAA argues the Board has already found such commission fixing agreements to be illegal. 371/

IATA's cargo agreement analysis, like BDA's, essentially duplicates their passenger agreement analysis. It states that the major objective of the agreements is to establish vertical restraints on agents so that they may be commonly appointed by all carriers and become industry agents.

369/ The history of cargo agent commission levels may be indicative of theincreased competition that they face. At the time IATA went to open commissions, the fixed rate for passenger point-to-point sales was 7 percent, and the fixed rate for cargo was 5 percent. Since commissions were opened, the passenger rate has risen to 10 while the cargo rate has stayed at 5%. Blakely (IAAA) 13 Tr. 47.

370/ IATA Resolution 803 5D(1) and (3). They provide:

> (1) Nature of Remuneration and to Whom Payable:
>
> The Member may remunerate an Agent under appointment to sell and handle international air cargo transportation on its behalf....
>
> (3) Payment of Remuneration:
>
> The remuneration shall be payable only to agents appointed by the paying Member in accordance with Section 8 hereof.

371/ IAAA Brief to Board at 11.

These agents, it says, will competently serve the public and air carriers. IATA maintains that exclusivity helps secure the public benefits of the programs. Moreover, no one has been excluded from the relevant market, i.e., bundled cargo agency services. If a person is excluded, he can enter the industry through the alternative of air freight forwarding. Exclusivity, therefore, is a reasonable ancillary restraint.

Although the analysis we have applied to the exclusivity provisions of the passenger agency programs applies, to a great extent, to the exclusivity provisions of the cargo agency program, it is also clear that the exclusivity provisions have clearly been less effective in dampening competition in air cargo transportation distribution. There are more kinds of air cargo marketers than there are passenger service marketers. There are, of course, air carriers providing some services. Usually they merely accept and check freight prepared for transport, then load and transport it. Airlines provide some pickup and delivery services, or package service to the public. There are cargo agents and airfeight forwarders. Both perform essentially the same "ready for carriage" functions of accepting, weighing, packaging and documenting shipments. Both also consolidate shipments. The difference between the two is that the forwarder is also an indirect air carrier, and can therefore set his own rates. While agents rely on commissions as the means of compensation, forwarders rely on the price differentials between what they charge their customer and what they are charged on consolidated shipments to earn a profit. Nonetheless, forwarder status constitutes a readily available alternative to agency status. In addition to cargo agents and forwarders, cargo general sales agents and shipper cooperatives are free to perform the same services. 372/

We conclude, however, that the exclusivity provisions should be disapproved. As with the passenger agency exclusivity provisions, they were adopted with the view of denying participants in the conferences the use of alternate marketers. Moreover, we cannot conclude that other forms of cargo distribution would not have entered the marketplace if the exclusivity provisions had not been in place.

D. Accreditation Standards

No party has attacked the individual accreditation standards of the IATA cargo agency program. The standards for premises, competency and integrity do not appear excessive and are generally necessary in order to induce air carriers to participate in the common accreditation program. Moreover, it should be noted that the cargo agency standards are, in most respects, less restrictive than their passenger agency counterparts.

The IATA location requirements provide that an agent must operate at least one administrative or sales office in the country where he seeks approval and provide all services and handling functions necessary for

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372/ This adds further support to our conclusion above that passenger agency exclusivity is not necessary to preserve the agency programs.

proper processing of shippers' air cargo. [373] IATA's competency standard for cargo agents requires that a person must have been actively engaged in the promotion and sale of international air cargo transportation and have provided services in the cargo industry for at least six months prior to the date of application. [374] The applicant must also have a satisfactory financial and credit standing. [375]

We have expressed doubts about promotion requirements in the context of the passenger agency programs. We have no evidence, however, on how this standard is applied and no party has objected to its inclusion in the standards. We will therefore adopt Judge Yoder's conclusion that these provisions are reasonable and do not substantially restrain competition.

Judge Yoder also concluded that the cargo equivalent of the 20% rule should be approved. It provides that a company cannot do "substantial" business with itself or any affiliate. [376] He reasoned that it is necessary to insure that persons become agents to promote and sell to the general public and to discourage customers from becoming agents for the purpose of obtaining rebates in contravention of section 403 of the Act.

We have decided to approve the provision despite its effect on competition until December 31, 1984. Although we have interpreted section 403 to permit users of the international air freight system to request and receive compensation for services performed, [377] such that commissions to persons providing services to air carriers would not then constitute a rebate, that policy has not been in effect for a significant period of time. We believe we should afford the air cargo distribution industry more time to adjust to our new policies. We conclude, therefore, as we did in our discussion of the similar provisions in the passenger agreements, that the rule should be retained for a transitionary period.

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[373] IATA Resolution 803 USA §A(2)(e); 86 Tr. 18-19 and 103.
[374] IATA Resolution 803 USA §A(1)(a); 86 Tr. 18, 85.
[375] IATA Resolution 803 USA §A(1);(d). Ruggiero (IATA) 86 Tr.104. Apparently, IATA interprets its resolution requiring "satisfactory" financial and credit standing to mean that an applicant must have a $20,000 equitable interest in a corporate agency, or $15,000 in working capital in the case of a non-corporate one. Ruggiero (IATA) 86 Tr. 104.
[376] Resolution 803 §A(3)(b) and (3)(c).
[377] 14 CFR §399.86, PS-86, 44 FR 45609, August 3, 1979.

E. Miscellaneous Provisions

Judge Yoder recommended several changes in the cargo agency programs. Most of them are not challenged by any party. We have examined his analysis and we believe it is consistent with the requirements of the Act. We will therefore adopt his conclusions on those issues. They are as follows:

1. Removing restraints on agency compensation; I.D. at 190-191.
2. Authorizing commissions for agency applicants; I.D. at 192-193. But we will not require the amendment to those provisions.
3. Removing restraints on consideration of subsequent applications; I.D. at 192. However, we will not require that the rules be clarified.
4. Approving changes in descriptive terminology; I.D. at 193-194. We will not, however, require ment these changes be made.
5. Eliminating automatic default procedures; I.D. at 195.
6. Allowing individual settlement of airline claims; I.D. at 195.
7. Modifying agents' sole liability; I.D. at 195-196.
8. Dismissing the Cargo Accounts Settlement System-Collect; I.D. at 204-207.

A number of issues remain, however.

1. Cargo General Sales Agents

For the reasons set out in our discussion of the passenger GSA agreements, [378] we will disapprove the territorial limitations of the cargo GSA agreements. Those provisions do not result in efficiency gains of any kind and are not supported by legitimate air carrier objectives.

2. Collective Default Action

IATA rules require collective default action against a registered cargo agent whenever an agent using individual traffic documents defaults to a single carrier. [379] Judge Yoder would apply these provisions only after the IATA administrators had determined that "no *bona fide* commercial dispute" existed. BDA and IAAA maintain that the Board *should* prevent use of conference power to resolve individual carrier disputes. BDA would require that IATA rescind non-CASS rules or provide for impartial review of the dispute before conference action is taken. IAAA would prefer that the present essentially bilateral method of settling disputes be continued.

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[378] See page 96-97, supra.

IATA responds that an initial default is fairly indicative of an agent's financial weakness. Moreover, it says, no action is taken until it is established that a default has occurred.

We rejected the argument that defaults to individual carriers are indicative of an agent's financial weakness such that conference intervention is warranted in the ATC passenger agency agreement context. [380] Our rationale is no less pertinent here. Agents may have legitimate disputes with airlines that must be resolved between them and not through the additional pressures the conferences may bring to bear.

While we are disapproving the provisions listed above, we wish to make it clear that our concerns are very limited. One way of eliminating these concerns has already been suggested. For example, IATA may adopt rules requiring a review of any dispute by a neutral adjudicator prior to such action. While we recommend IATA take action to insure that a dispute is legitimate, we will not require them to do so.

The Cargo Agents Settlement System (CASS) is a settlement clearinghouse patterned after the Area Settlement Plan. Like the ASP, CASS provides for uniform reporting and remitting cycles. Documents are to be centrally processed, with reports of transactions and liabilities prepared for participating carriers and agents. In order to facilitate centralized processing, IATA is apparently attempting to devise a standard airwaybill that may be issued by machines.

CASS is a relatively new program. Although it was approved in August 1978, [381] IATA did not begin implementation at that time, particularly because IATA agent participation was mandatory. After receiving protests from IAAA, the Board granted their request for reconsideration of its approval of CASS and withdrew its approval of mandatory participation provisions. [382]

IATA makes essentially the same arguments in support of CASS as ATC made in support of the ASP. It argues that the automated procedures of CASS will generate substantial cost savings. It states that CASS will eliminate backroom accounting operations, resulting in faster processing and compensation. In addition, CASS lays the necessary groundwork for standardized airwaybills, so they can be machine generated. IATA adds that CASS has been highly successful since its implementation last year, even though only volunteers have participated because of the Board's decisions.

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[379] IATA Resolution 803, §§G(2)(c), (d), (6), (9); 821 §18(c); 823 §3(c).
[380] Orders 79-8-134 and 80-6-101.
[381] Order 78-8-25, August 24, 1978.
[382] Orders 81-6-175, 81-9-83 and 81-12-121.

The major controversy surrounding the CASS program involves whether participation in the program should be mandatory for IATA agents.

IATA asks the Board to approve provisions requiring mandatory participation by IATA cargo agents. It states that mandatory participation is interrelated with uniform remitting. The provisions, taken together, generate the efficiencies of the program. Competition is not affected because the funds agents hold in trust have no value to the agent while they are in his hands. In short, IATA believes a mandatory CASS only "mechanizes" and centralizes reporting and remitting of funds held in trust by the cargo agent for its carrier principals.

IATA indicates that the concerns the Board expressed in Order 81-9-83 have been addressed in the record. Carriers want full agency participation in CASS to obtain maximum efficiencies. IATA asserts that the record demonstrates there will be no harm to agents: they will benefit from CASS's efficiencies, get their remuneration earlier, and CASS will not interfere with current methods of reporting.

Judge Yoder concluded cargo agent participation in CASS should be discretionary, ruling against IATA's position that it should be made mandatory for all a carrier's agents once the carrier chooses to participate in the program.

We will adopt Judge Yoder's conclusions with respect to the CASS agreements. The grounds IATA offers in support of a mandatory CASS are essentially the same as those we rejected when we disapproved mandatory IATA participation in the ASP. [384] Similarly, we adopt his recommendation that we disapprove provisions precluding settlement outside CASS on less frequent settlement schedules.

With these changes, we conclude that the cargo agency agreements at issue do not substantially restrict competition and they are approved.

ANTITRUST IMMUNITY

The final question we have to consider is whether to confer antitrust immunity on the agreements we have approved.

A. Section 414

Section 414 sets out two circumstances in which antitrust immunity may

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[383] Order 80-1-74, January 14, 1980.
[384] I.D. at 203-04.

or must be granted. [385] First, §414 gives the Board the discretion to grant antitrust immunity to an agreement to the extent necessary to allow the transaction to go forward if it determines that an exemption is required in the public interest. Second, the Board must grant antitrust immunity if an anticompetitive agreement is approved because of public benefits that cannot be obtained by less anticompetitive alternatives. Antitrust immunity must be granted to the extent necessary to allow it to go forward. Everyone acknowledges that it is now well established in Board precedent that there are two tests for conferral of antitrust immunity, one discretionary, one mandatory. [386]

With his proposed modifications, Judge Yoder concluded that the agreements at issue would not substantially lessen competition. The provisions of section 414 of the Federal Aviation Act that would make the grant of antitrust immunity mandatory would therefore not apply. However, he concluded that antitrust immunity should be granted in the public interest. He cited cases where the Board has granted immunity in circumstances where carriers would not participate in programs without it. In this case he concluded the threat to implementation of the agreements was no less severe. He noted that the Board has found the agreements appear to be anticompetitive. Consequently, he recommends that immunity be granted in order to avoid any threat to the benefits of the programs.

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[385] "In any order made under section 408, 409, or 412 of this Act, the Board may, as part of such order, exempt any person affected by such order from the operations of the "anti-trust laws" set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest. Notwithstanding the preceding sentence, on the basis of the findings required in subsection (a)(2)(A)(i) of section 412, the Board shall, as part of any order under such section which approves any contract, agreement, or request or any modification of cancellation thereof, exempt any person affected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order."

[386] However, ASTA, ATC and IATA allege that the antitrust immunity must be granted if an agreement is attacked as anticompetitive, as opposed to being found to be anticompetitive.

B. Our Conclusions

Except with respect to the interline exclusivity and BTD rules, which we have found to be anticompetitive but to merit approval under the savings clause, we have concluded that the agreements do not substantially reduce competition. Accordingly, the grant of antitrust immunity is discretionary as to the remainder of the agreements. We discuss the ramifications of our approval of the particular anticompetitive provisions in our discussion of mandatory immunity.

We have decided to grant antitrust immunity as a transitional measure for approximately 2 years until December 31, 1984 to the various ATC and IATA programs approved in this opinion. Our basic policy is that exposure to antitrust litigation is consistent with reliance on competition, and that the grant of antitrust immunity represents a decision that competition will fail. These considerations cause us to apply very stringent standards for the grant of antitrust immunity on an indefinite basis. Nevertheless, we have recognized that the grant of immunity for a limited period of time is required by the public interest to permit a smooth transition to a fully competitive environment.

In the context of other section 412 agreements, we have recognized that an abrupt shift from a protected regime to one of full exposure to antitrust liability may cause parties to withdraw. Although this has never prompted us to give indefinite antitrust immunity, we have found the public interest to require transitional immunity where the agreement provided recognizable public benefits, and where we concluded that changes in the agreement might be required to permit it to withstand antitrust scrutiny. 387/

These considerations apply with equal force to the ATC and IATA passenger agency programs. The benefits in terms of lowering carrier marketing costs and increasing consumer access to air transportation and the full array of competitive alternatives have been well documented.

We have found, as we did in the Allegheny commuter cases that the concept of common accreditation is not inherently anticompetitive, and that

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387/ See, e.g., Allegheny Airlines, Inc. Commuter Replacement Agreements, Orders 79-2-108, February 15, 1979, and 79-3-156, March 26, 1979, in which the Board conferred antitrust immunity for a transitional period to Allegheny Commuter franchise agreements. The Board concluded that since franchise agreements were not inherently anticompetitive, there was no need to be concerned about eventual removal of immunity but it concluded that "...a limited exemption to permit Allegheny time to analyze its existing agreements and bring any offensive terms or conduct back within the accepted limits of franchising activity is equally consistent with the statutory concern for small communities." Order 79-2-106 at 15. Maintenance of small community service was the specific public benefit with which the Board was concerned.

a properly framed agreement would pass muster under the antitrust laws. Under these circumstances, we are not concerned that eventual exposure to antitrust challenge will cause the programs to collapse.

Our decision disapproves, in a two step process, the most anticompetitive provisions of the ATC and IATA passenger programs, i.e., the exclusivity provisions. However, other provisions, such as the experience requirements, may go farther than are necessary to meet their legitimate purposes. We have concluded that as a matter of policy it is more appropriate for carriers to work out alternative provisions than to have us dictate changes. The short term risks of antitrust prosecution might make some carriers reluctant to participate while this process is going on.

The various agency programs at issue here are much more complex than the Allegheny commuter agreements to which we have applied a transitional immunity policy in the past. Moreover, carriers have operated under the existing system for almost 40 years. Immediate withdrawal of antitrust immunity could disrupt the orderly transition period we conclude best serves the public interest.

In addition, we have decided to permit the carriers to maintain a limited form of exclusivity for interline ticketing as a transitional measure. To provide the participants a period of adjustment, we find that antitrust immunity is required in the public interest until December 31, 1984 for the ATC and IATA programs at issue in this proceeding. An indefinite grant of antitrust immunity would not, however, be required by the public interest.

The power to confer antitrust immunity is a regulatory power: it is given where competition has been supplanted by active regulation by an administrative agency.[388] Regulation is imposed upon an industry when Congress determines that the normal operation of the competitive process will not serve the public because the industry is a natural monopoly or there is a defect in the market structure that will prevent it from operating competitively. Antitrust immunity is conferred because conduct, which in other industries would be considered to be abuses of competitive processes, may be in the public interest in a regulated industry.[389]

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[388] See FCC v. RCA Communications, Inc., 346 US 86 (1953).

In terms of policy, we have recognized that full antitrust exposure is consistent with deregulation.[390] Other entities pursue cooperative activities but they do so with a careful regard not to restrict competition unreasonably. Government intervention in the form of agreement approval and immunity is supplemented by a general rule of competition. Courts intervene only when there is a dispute.

We have previously rejected arguments that immunity must be granted because of the fear of unwarranted law suits on the grounds that such exposure is a normal facet of doing business in a non-regulated market.[391]

Consequently, the Board has set a high standard for granting antitrust immunity. Antitrust immunity will not be granted unless an applicant makes a strong showing of two predicates: first, that immunity is required by the public interest, and second that the transaction will not go forward without that immunity.[392]

Applying that policy to this case, antitrust immunity would not be granted. The public interest arguments that have been raised are founded on the view that carriers will abandon the ATC and IATA systems because of the fear and cost of lawsuits. Their argument makes sense only if we approve the current system without much change, as Judge Yoder did. But if the handful of provisions with significant anticompetitive effects are disapproved, the common accreditation system and the ASP would not be subject to serious challenge under the antitrust laws. Carriers will not abandon the substantial benefits of common accreditation to avoid the comparatively small costs of defending it against frivolous attacks.

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[389] As a practical matter, once an agreement receives approval and immunity, we are obligated legally to carefully scrutinize every change and every complaint about how the program is administered. This will be so even when exclusivity and other anticompetitive provisions are eliminated. The record is seldom as complete as necessary to regulate well. ATC or IATA provide relatively short justifications. Unless some existing group's interests are directly affected, there may be no objections. If there are objections, they are likely to be self-interested. While we and our staff can certainly do our best in analyzing the agreements, the truth is that the real world effects may not be readily apparent, and there is often an insufficient factual basis to decide whether a provision is likely to unjustifiably inhibit competition.

[390] Allegheny Commuter Agreements, Order 79-2-108 at 5, North Central-Southern Merger, Order 79-6-7/8 at 8 and TXI-Pan Am-National Acquisition, Order 79-12-163/164/165 at 75.

[391] Allegheny Commuter Agreements, Order 79-2-108 at 15, UATP, Order 80-6-66 at 33 and Air Cargo, Inc. Show Cause, Order 82-5-106 at 7-8.

[392] TXI-Pan Am-National Acquisition, Order 79-12-163/164/165 at 75.

We cannot give complete assurance that there would be no remaining provision that some court somewhere might not find to be anticompetitive. Whether there is an anticompetitive effect often depends upon how an agreement is implemented. But carriers, both foreign and domestic, are now liable under the antitrust laws for actions that a court determines are outside the scope of the antitrust immunity granted by the Board. 393/ The only area of protection is for the terms of the agreement. Even then, courts are reluctant to extend the reach of immunity beyond what is absolutely authorized by the Board. This means that carriers are currently subject to antitrust lawsuits, whether frivolous or not. Exposure to antitrust liability in other sectors of our economy is recognized as an important deterrent to anticompetitive behavior.

Finally, continued immunity for the ATC/IATA accreditation systems would inhibit our long-term goal of introducing more competition into the distribution system. Immunity maintains an artificial disincentive to the development of alternatives since carrier risks are greater if they move outside the immunized activity. Airlines have become accustomed to the security of immunity and may initially feel uncomfortable about losing it. Moreover, continued antitrust immunity would require the Board and its successor agency to continue its role as antitrust policeman. With immunity, carriers would continue to seek Board approval and immunity of modifications to agreements. It is often difficult to predict the competitive effects of an agreement which has not yet been implemented and we have no assurance that we could always do so accurately. Without immunity carriers will be their own policeman. While the threat of antitrust litigation will not cause them to abandon the programm, it will provide strong incentives for them to tailor their agreements to assure that they involve no unnecessary risk. 394/

We are therefore not convinced that indefinite antitrust immunity for the agreements is required in the public interest. Long term elimination of antitrust immunity would be most consistent with our fundamental decision in this case, i.e., that aside from disapproving exclusivity in order to permit competitive alternatives to arise, any further actions to increase competition should be developed by the carriers themselves.

As has always been the case, parties are free to request reconsideration of the ultimate withdrawal of antitrust immunity at any

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393/ Lowe v. Int'l Air Transport Ass'n, 1975-2 Trade Cases ¶60,668 (S.D.N.Y. 1976).

394/ It has been suggested that the threat of antitrust litigation may cause carriers to forego improvements to the program which raise close competitive questions. To some extent this can be alleviated by use of Department of Justice business review letters through which carriers can request advisory opinions on whether a particular practice would violate the antitrust laws. See, 28 C.F.R. §50.6. The Department of Justice's position before the Board is also indicative of the practices it would likely challenge.

time. We would caution parties, however, that consistent with past decisions, we would not expect to reconsider the immunity issue unless parties demonstrate materially changed circumstances or an important need strongly suggesting that the continuation of immunity should be considered.[395] Of course, we have the authority to reconsider the immunity question based on changed circumstances on our own motion.

C. Parties' Arguments--Mandatory Immunity

ATC, ASTA and IATA argue that immunity is mandatory whenever an agreement is challenged as anticompetitive and proponents defend it under the savings clause. In support of this position, they rely on the language of section 414.[396] Proponents argue that they must, in section 412 proceedings, present an affirmative showing under the savings clause whenever an agreement is challenged as anticompetitive. Having done so, as they did in this case, they are entitled to immunity.[397]

This interpretation distorts the clear intent of Congress in revising sections 412 and 414 in 1978 and, later, in 1979. In passing the Airline Deregulation Act, Congress intended to limit the circumstances in which antitrust immunity was granted to those where we found it was necessary in order for a transaction to go forward or was otherwise required by the public interest.[398] The subsequent amendment only clarified Congress' intention that transactions that are anticompetitive, but provide important public benefits and transportation needs, are in the public interest and must be granted antitrust immunity to the extent necessary to allow the transaction to go forward.[399]

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[395] Universal Air Travel Plan, Order 80-6-66 at 34.

[396] They cite language of section 414 amended by the IATCA legislation provides that "...on the basis of findings required by subsection (a)(2)(A)(i) of section 412, the Board shall, as part of any order which approved any contract agreement or request, or any modification or cancellation thereof exempt any person affect by such order from the operations of the antitrust laws to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order."

[397] They rely on language in the legislative history of IATCA to the effect that:

> "when the Board approves an agreement under the modified Bank Merger Act test the Board shall grant an exemption from the antitrust laws for actions necessary to carry out the approved agreement."

H.R. Rep. 96-602, 96th Cong. 1st Sess. (November 8, 1979) at 8. See also H.R. Rep. 96-7161, 96th Cong. 1st Sess. December 19, 1979), at 73.

[398] H.R. 95-1779 at 78, October 12, 1978.

If we were to adopt the interpretation ATC, ASTA and IATA propose, our discretion in granting immunity would be severely curtailed. Parties will characterize procompetitive effects as "public benefits" as they have here. While we have considered these arguments in our competitive analysis we have determined that the other asserted transportation benefits that would not be recognized under the antitrust laws do not justify approval of the agreements. The mere fact that parties have produced evidence under the savings clause should not result in mandatory immunity. This would produce the anomalous result that agreements that pass muster under the antitrust laws and whose public benefits might never have been considered by the Board must be granted antitrust immunity.

Proponents also argue that we do not have the discretion to disapprove particular provisions of the agreements under the anticompetitive clause of section 412. According to the proponents of mandatory immunity, we cannot disapprove anticompetitive provisions in order to avoid conferring automatic immunity.

As discussed earlier, this view of our powers under section 412 is incorrect. We have long considered ourselves to have the power to conditionally approve agreements under the standards of section 412, including the power to limit the applicability of approved provisions to certain transactions.[400] This view has been sustained by the courts.[401] Nothing in the ADA amendments to section 412 or their legislative history suggests that the addition of the new competitive standards to section 412 precludes us from using this power to require

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399/ "Under existing law (Section 414) the Board needs to make a separate public interest finding in order to immunize an agreement approved under the Bank Merger Act test from the antitrust laws. The committee does not see a need for this separate finding in which the *Board has determined that the agreement should be approved even though it violates the antitrust laws*. Accordingly section 26 amends section 414 of the Act to provide that when the Board approves an agreement under the modified Bank Merger Act Test, the Board shall grant an exemption from the antitrust laws..." H.R. Rep. No. 96-602, 96th Cong., 1st Sess. (Nov. 8, 1979) at 8. (emphasis added). We note that the Initial Decision in this case may have given the wrong impression about the circumstances in which antitrust immunity is granted. Prior to the ADA, antitrust immunity was automatically granted to an agreement approved under section 412,, which made the filing of any carrier agreement mandatory. The language quoted at page 29 of the I.D. refers only to Board practice after 1978 and prior to the amendments made by the International Air Transportation Competition Act of 1979.

400/ *See e.g.*, *Popular Latin Travel Agency*, Orders 78-10-31, October 5, 1978 and 79-8-134, August 24, 1979. ATC conference default procedures cannot be applied to a dispute with a single carrier unless an independent finding is made that such a dispute presents a risk to all conference members.

401/ *McManus v. CAB*, 286 F.2d 414 (2d Cir. 1961).

deletion of provisions inconsistent with those standards. Indeed, the requirement that we consider less anticompetitive alternatives compels the opposite conclusion.

The justification for our ability to conditionally approve agreements under the competitive test is simple. It avoids unnecessary and wasteful disapproval of entire agreements which are fundamentally sound, but have a few particular offensive provisions. Carrier resources are saved because they do not have to go through the expense of drafting a whole new agreement, and Board resources are saved because it does not have to review that agreement.

This argument, however raises another issue with respect to the grant of antitrust immunity. Having identified specific provisions of agreements as restraints on competition and approved them under the savings clause, the issue arises as to whether the mandatory immunity provisions of section 414 apply only to those provisions, or to the entire agreement containing those provisions.

In amending section 412 in 1978, to give the Board discretion to exempt persons from the antitrust laws, Congress provided specifically that the exemption could be given only "...to the extent necessary to enable such person to proceed with the transaction approved by the Board... and those transactions necessarily contemplated in such [approval]". [402] The legislative history of this provision indicates a clear Congressional concern that the previous provisions of section 414 resulted in much broader immunity than appeared necessary to accomplish its purpose, [403] and that the Board, therefore, should have some ability to limit its scope. [404] The ability to limit and tailor antitrust immunity only to provide that which is necessary must reasonably include the ability to immunize portions of an agreement. If this were not the case, the policy justification for discretionary immunity, that exposure to antitrust laws is consistent with reliance on actual and potential competition, could be thwarted.

The 1979 amendments were a procedural change, eliminating the need to make what Congress considered to be a redundant showing that immunity was required in the public interest after the Board had already concluded that approval of an anticompetitive agreement was required to secure serious transportation needs or important public benefits. [405] Moreover, Congress explicitly provided that the mandatory immunity was to be provided only to the extent necessary to enable a transaction to go forward. If grant of immunity to a portion of an agreement is all that is necessary to permit a transaction to go forward, there is no logical reason to extend the grant of immunity further.

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[402] P.L. 95-504, §30, 92 Stat. 1731 §30.

[403] S. Rep. 95-631, 95th Cong. 2nd Sess. (Feb. 6, 1978) at 84-85., H.R. Rep. 95-1217 95th Cong. 2nd Sess (May 19, 1978) at 18.

[404] "...the Board will be allowed to...refrain from granting antitrust immunity on any or all aspects of the transaction [approved by the Board]." S.Rep. 95-504, at 15; "immunity shall be granted only insofar as is necessary to completion of transactions approved by the Board...the grant of antittrust immunity is discretionary with the Board..." H.R.Rep. 95-1211, at 29.

[405] *See* pages 126-27, *supra*.

On the basis of these considerations, we conclude that we are required to give antitrust immunity only to the exclusivity and BTD rules for the duration of their approval. Even if immunity were required to be given to the whole of the agreements as a result of our approval of the exclusivity and BTD provisions, the outcome of this case would not be different. As a matter of discretion, we have decided to confer antitrust immunity on the whole of the agreements for a period coextensive with our approval of these provisions. After December 31, 1984, these provisions will no longer be approved. The grant of mandatory immunity by operation of law will cease for those aspects of the agreements that we have found may substantially reduce competition. We will have full discretion to withhold immunity from the agreements which will remain approved after that date because our approval is based on the finding that the remainder of the agreements do not substantially reduce copetition.

We turn now to parties' arguments concerning discretionary immunity. Given our decision to grant transitional immunity, we consider them in the context of whether antitrust immunity is required in the public interest, after a transition period, when the agreements which are still approved will not be anticompetitive and we will have full discretion to grant or withhold immunity.

E. Parties' Arguments--Discretionary Immunity

At the outset, we reiterate our conclusions that our past decisions have emphasized that the grant of antitrust immunity is extraordinary relief, rather than a routine occurrence. In enacting the ADA, Congress directed that control of the air transportation system be returned to the marketplace. We have consistently held that a part of the return to market control is exposure of participants to the antitrust laws, as that exposure exists in unregulated industries. [406]

Parties have argued that grant of antitrust immunity is not necessarily inconsistent with competition. They point out that before immunity is conferred, an agreement must be submitted to the Board and tested under a competitive standard. In addition, once an agreement is approved, parties do not have wide discretion in their activity. Courts will not recognize immunity for practices that do not conform to the terms of the Board's approval. [407]

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[406] *UATP*, Order 80-6-66 at 33 and the cases cited therein.

[407] Citing *Lowe v. Int'l. Air Transport Ass'n*, 1975-2 Trade Cases ¶60,668 (S.D.N.Y. 1976) and *Grueninger Int'l. Travel, Inc. v. Air Transport Ass'n. of America*, 551 F.2d 1324, 1326 (D.C. Cir. 1977).

We agree that conferral of immunity does not give carriers free rein to restrict competition. However, exposure to antitrust laws is most consistent with an industry controlled by competition. The approval-immunity system under sections 412 and 414 is an inherently different system for controlling carrier behavior than the system of competition and exposure to antitrust laws. Under the first, the government is still the ultimate arbiter of the public interest. In the latter, carrier managements weigh their interests and those of parties who will be affected by an agreement, subject only to the requirement that their agreements do not unreasonably restrain competition.

Exposure to antitrust liability will also make enforcement of the policy of section 412 that intercarrier agreements not unreasonably restrain competition more efficient. Without antitrust immunity, this policy will be largely self-enforced by the carriers.

Finally, immunizing the agency agreements will reduce the efficacy of our decision which is to encourage competition in distribution by disapproving provisions of the existing programs which serve only to protect it from competition from outside. The perpetual immunization of the programs from the accepted rules of competitive behavior would give the present accreditation programs an unwarranted advantage over any alternate distribution mechanism which does not have the protection of immunity.

Given these considerations, we would consider conferring antitrust immunity on an indefinite basis only if we were fairly certain that failure to do so would cause the programs harm. That case has not been demonstrated on the record.

1. Carriers will not withdraw because of the potential cost of antitrust litigation

Parties argue that exposure to antitrust litigation will add significantly to the cost of the system in two ways. First, the costs of litigation are potentially enormous and secondly the potential liability, both civil and criminal, is likewise potentially large. These potential costs will, it is argued, drive carriers out of the system.

The record does not support this prediction. When asked if ending immunity would lead to their withdrawal, only one carrier was willing to predict that it would. At most, they could only predict that withdrawal of immunity would require them to reevaluate participation. [408]

The benefits of the common accreditation program justify continued participation by most carriers even in the face of antitrust risk. Since passage of the ADA, we have withdrawn immunity from the UATP credit card [409] a joint venture for cargo pick-up and delivery in the U.S. [410] and a joint venture for consolidated publishing of information on scheduled air tours (combinations of air fare and ground packages put together by independent businesses and sold by them or through travel agents). [411] In each case, the programs continued to function. [412] The Airline Clearinghouse--the mechanism by which accounts between airlines are settled and which closely parallels the ASP--has been functioning for almost 40 years without antitrust immunity. [413] Similarly, airline agreements establishing an information pool on available spare parts has operated without immunity since its inception.[414] Finally, the experience in unregulated industries confirms that a joint venture which produces real benefits will induce participation notwithstanding antitrust risk. Thus real estate listings services continue to operate despite the fact that some have been challenged under the antitrust laws.[415]

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[408] Costello (Republic), 20.A. Tr. at 96; Carter (USAir) 20.A. Tr. at 94, 95; Reynolds (Eastern) 20.A. Tr. at 102; Clark (British Airways) 0.A. Tr. Vol. 2 at 106. The one exception was Simpson (Air California) 0.A. Tr. Vol. 2 at 98.

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[409] Order 80-6-66.

[410] *Air Cargo Inc.*, Orders 81-11-121, November 19, 1981 and 82-5-106 at 6-7.

[411] *Consolidated Air Tour Manual*, Order 80-6-39, June 6, 1980.

[412] *See* Costello (Republic) 2 O.A. Tr. at 90-91. Ruden (ASTA) 2 O.A. Tr. at 122. However, there were changes. For example, CATM was ultimately sold to an independent third party, but it continues to function. Costello (Republic) 2 O.A. Transcript at 91.

[413] By Order 2829, May 1, 1944, the Board disclaimed jurisdiction over the ATC Airline Clearinghouse.

In this regard, the agreements before us are distinguishable from the instances cited by proponents of immunity and relied on by the ALJ in which we granted antitrust immunity for discussion authority. In those cases, we were authorizing short-term discussion authority to carriers to allow them to address the emergency situations created by the PATCO job action. Because of the urgency created by the PATCO strike, immediate action on the carriers' part was necessary. Under these circumstances risk of antitrust litigation, even though we had found the discussions not to have been anticompetitive, might have caused carriers not to participate.

In contrast, this case involves agreements whose benefits are known to carriers and have been demonstrated on the record. If the benefits of a program are uncertain, risks such as antitrust attack may make carriers less willing to participate. But when the basic efficiencies are obvious, it is difficult to believe that carriers will leave a program rather than make the modifications necessary to reduce potential antitrust liability. By providing for transitional immunity we have given the carriers an opportunity to do just that.

Another factor that must be considered in granting antitrust immunity is the duration of time for which an exemption is requested and the activities that are contemplated. For example, in the cases cited by ASTA, IATA and ACT, the effects of the antitrust immunity were short-lived. The authorizations lasted for only 60 days and any agreements reached in the discussions were required to be submitted for Board approval. The Board could easily monitor and correct any problems created by the departure from the Board's policy that exposure to antitrust laws is a part of a competitive system. The impact of indefinite antitrust immunity is much harder to predict, and would require much greater vigilance on the part of the Board.

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[414] See Motion to file an Unauthorized Document of the Airline Services Association, filed in Docket 40860, September 30, 1982.

[415] In the Washington, D.C. area, for example, both the Montgomery and Prince George's County, Maryland Board of Realtors operate multiple listing services based on 1980 C&P Telephone Co. Yellow Pages listings.

2. Threat of Antitrust Litigation

The ALJ found that the threat of antitrust litigation was substantial. He relied on the position taken by DOJ at trial that even with the elimination of exclusivity, the agreements were so anticompetitive as to require disapproval in their entirety, and he relied on the fact that opponents of antitrust immunity assumed exclusivity would in fact be disapproved.

DOJ's position before the ALJ, was based upon the view that, with only disapproval of exclusivity provisions, the passenger agreements would not be subject to significant competition within the near future. In its view, the benefits of participation in the programs are so substantial, both to air carriers and participants, that the programs would remain in place for some time to come. 416/ Rather than revise individual standards, it proposed to disapprove the program in order to allow one that placed the least possible restraints on competition to arise. Now it has identified the restraints on competition that should be eliminated. With those disapprovals it maintains, and we agree, that the agreements would not be attacked by the Department under the antitrust laws. Although we have not immediately disapproved all of the restraints identified by DOJ, the most serious will be disapproved after December 31, 1984. In the interim, carriers will have protection from antitrust attack. 417/

Approval of the basic programs does not mean that all risk of antitrust lawsuits is precluded. Carriers and travel agents may be liable for actions that fall outside of the legitimate areas of cooperation or for administration of the progams in a way that was not contemplated under the agreements we have reviewed. However, immunity does not now extend to anticompetitive conduct that is outside of the scope of our approvals. 418/

This leaves only the threat of frivolous or nuisance litigation. Proponents argue that frivolous lawsuits have arisen fairly routinely with immunity in place. 419/ Proponents of immunity argue that if immunity were lifted such litigation might increase dramatically. According to proponents, even frivolous lawsuits have costs, either in direct litigation costs or in payment of nuisance value settlements. They suggest that these costs could be of such magnitude that carriers would withdraw. 420/

415/ Brief to ALJ at 30-40.

417/ Moreover, DOJ has indicated that although it might appeal the Board's decision it would not litigate these issues in a separate antitrust suit. Retchin (DOJ) 20.A. Tr. at 73, 74, 152. The concerns of other parties who have litigated issues in this case have been largely met by our immediate disapprovals or those that will take effect at the end of the transition period.

418/ See page 46 n.158, *supra*.

419/ See I.D. at 210

420/ A related problem is alleged to be equally serious. The threat of individual personal liability if immunity is withdrawn may make it impossible to hire staff to administer the program.

Of course, precise prediction of what will happen if immunity is removed is impossible and at best we can only make a reasoned assessment. We conclude that exposure to nuisance suits will not cause the programs harm. As a general matter, we observe that the various programs in the air transportation industry and other industries have survived without antitrust protection even though cooperative activities are exposed to nuisance suits as well as meritorious ones. Secondly, antitrust immunity has not fully protected these programs from nuisance suits in the past and carriers have found means to cope with this problem.

Frivolous complaints do not survive the summary judgment process and do not demand batteries of lawyers. Indeed, these costs may not greatly exceed the costs of dealing with a regulatory agency. Airlines are already subject to the antitrust laws in other areas and are prepared to deal with this issue. 421/

3. Immunity is not required to give the Board's decision res judicata effect

Proponents of immunity argue that the Board's decision is not binding on the courts. Absent antitrust immunity, a court would be free if a case were brought to require full litigation of all antitrust issues decided here. They maintain that equity dictates that, having expended three years and substantial resources litigating the case, parties are entitled to antitrust peace. Since the Board's conclusions are not otherwise binding, they contend that res judicata effect can be given only through the grant of immunity. They also argue that the risk of conflicting judicial decisions is inconsistent with the Congressional decision giving independent agencies plenary jurisdiction over the various national transportation systems. 422/

Congress has provided an explicit standard for the grant of antitrust immunity, *i.e.*, that it is required in the public interest. Public interest considerations are clearly spelled out in the Act with great emphasis on fostering competition. We have discussed our reasons for

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421/ See *e.g.*, *Airline Executive*, October 1982, *USAir: Colodny's Profit Guidelines*, p. 29.

422/ Parties rely on *Texas and Pacific Railway Co. v. Abiline Cotton Oil Co.*, 204 US 426 (1907); *Far Eastern Conference v. United States*, 243 U.S. 570 (1952).

concluding that exposure to antitrust litigation will not harm the programs.

The argument that Congress did not intend to subject carrier agreements to potentially conflicting court decisions is not consistent with the ADA amendments to section 412. Congress withdrew our plenary jurisdiction by making the filings of carrier agreements optional. In addition, the sole purpose of amending section 414 to convert section 414 from a automatic provision to one giving the Board discretion to withhold immunity was to expose carriers to the antitrust laws. In the absence of evidence to the contrary, we must assume that Congress foresaw and did not seek to protect carriers from exposure to antitrust liability, including the risk of adverse or conflicting decisions in the courts.

If the Board were required by the public interest to grant immunity in order to protect carriers from conflicting judicial decisions we would have no discretion at all. 423/ Parties could always argue that there is a possibility of different courts reaching different conclusions. While we believe this threat is greatly overstated, no agency can claim to predict future behavior of the courts. Instead, we have consistently held that the discretionary immunity provisions reflected a Congressional decision that exposure to antitrust liability before different courts is consistent with the competitive market-oriented system established by the Board. This conclusion has been affirmed by the courts in upholding our authority to prohibit the filing of agreements by air freight forwarders and domestic cargo carriers. 424/

In any event, our decision to give a transitional period of antitrust immunity to the agreements responds to the concerns that carriers will be immediately subject to relitigation of the issues raised in this proceeding.

4. Foreign Policy Effects.

Proponents argue that approval without immunity will appear to foreign governments as a hollow gesture tantamount to disapproval. They claim that our actions will be considered by foreign governments as a denial to their carriers of fair and equal access to U.S. markets, will lead to retaliation against U.S. carriers, and make it more difficult to obtain long-term U.S. international aviation goals.

423/ The cases cited by applicants involved agencies with plenary authority over all aspects of industries in which competition is intended to play little if any role. Not only has Congress made the filing of intercarrier agreements optional, it has substantially reduced our authority in the entry and pricing areas.

424/ National Small Shipments Traffic Conference v. CAB, 618 F.2d 286 (D.C. Cir. 1980).

This argument is basically the same argument concerning foreign government perceptions that was raised with respect to exclusivity. We have carefully considered the likely impact of withdrawal of antitrust immunity on the programs and we have concluded that with the opportunity to make further adjustments during the transition period, carriers will not face a high risk of antitrust challenge.

- Grant of antitrust immunity solely to the IATA agreements could substantially undermine our objective to permit competition in ticket sales within the U.S. Virtually all travel agents are accredited by both the ATC and IATA and, as we have described, the IATA standards have generally been conformed to changes made by the ATC. If we were to grant antitrust immunity to IATA, several undesirable results might occur. Certain carriers might seek to adopt or continue anticompetitive restraints and seek foreign carrier support for initiatives designed to block competition on domestic sales. Moreover, agents could be forced to adhere to more restrictive IATA rules in order to retain their ability to sell international air transportation. Procompetitive changes in the ATC rules might therefore be of limited value to agents, carriers, and the public. While the ATC program has heretofore been the leader, grant of antitrust immunity could reverse this procedure, allowing foreign carriers to, in effect, dictate how airline tickets will be sold in the U.S. Alternatively, granting antitrust immunity to one system and not the other might result in divergent standards and thus increase the burdens on agents. Neither possible result is desirable. 425/

While we have carefully considered the claims about the spectre of antitrust lawsuits, foreign carriers do not now enjoy blanket immunity for their activities. Based on our conclusion that withdrawal of antitrust immunity will not jeopardize the agency distribution system, we find that foreign governments' interests in fair and equal access will not be materially affected. Foreign carrier speculation about antitrust exposure is not a sufficient basis to grant antitrust immunity to IATA carriers. We, therefore, conclude that foreign policy considerations do not require the grant of antitrust immunity after December 31, 1984.

CONCLUSION

This decision may be viewed by some as the beginning of a dramatic change in the air transportation distribution system. However, if changes are to occur, they will be in response to the demands of the marketplace. We have merely removed the constraints on competitive behavior in the existing system. We have carefully considered whether our actions will threaten the benefits of the existing system and conclude they will not.

425/ *See* page 125, *supra*.

The choice is not, then, between continued regulation or destruction of the present system. Rather, we have taken the first steps toward increased competition while preserving the beneficial aspects of the present distribution system, and continued the process of removing ourselves from regulatory involvement in the airline industry.

ACCORDINGLY, an appropriate order will be entered.

Vice-Chairman BAILEY, Members DALLEY and SMITH concurred in the above opinion. Chairman MCKINNON and Member SCHAFFER concurred in part and dissented in part. Vice-Chairman BAILEY and Member DALLEY filed the attached joint concurring statement. Chairman MCKINNON filed the concurring in part and dissenting in part statement. Member SCHAFFER concurred only to the extent that the majority has affirmed the Initial Decision, and she has filed the attached dissenting statement.

BAILEY, VICE CHAIRMAN, AND DALLEY, MEMBER, CONCURRING:

With this decision, the Board has taken the first steps toward increasing competition and ending regulatory intervention in the marketing of air transportation. We join in the decision because we think these steps are in the right direction. However, we believe that the Board should have taken greater strides to complete the last major piece of unfinished business in the deregulation process.

Fares will be completely deregulated about the time this opinion issues; yet, the Board is allowing the many constraints on the marketing of air transportation to drag on. The Board has seemingly decided to handicap the competitive process for an additional two years. In this concurring statement, we wish to assert our ardent belief in the economic principle that unfettered competition should be the preferred mechanism to insure consumer welfare. Antitrust theory declares that the law must protect the competitive process, and is not concerned with the preservation or continued prosperity of existing competitors. While the Board appears to adhere to this principle in the long run, the motivation for approval of anticompetitive provisions for a two year period seems to be premised on reducing the impact of competition on travel agents.

First, the record does not support dire predictions about the effects of eliminating exclusivity. 1/ Travel agents that are already providing valuable services to the general public will continue to prosper under the Board's decision. Second, even assuming that some time for adjustment of interline agreements may be necessary, it is difficult to believe that it will take two years.

The decision on interline exclusivity is acceptable to us only because carriers will be free to permit unaccredited agents to interline if they can secure the agreement of some or all carriers who would be affected. Because carriers have previously recognized the economic benefits they derive from interlining, we are hopeful that they will act reasonably. Nevertheless, we are afraid that the Board has created a disincentive that is simply not justified.

1/ Travel agents might, at most, lose 2 percent of their market share according to ASTA's witness. ASTA-20 at 111. The only evidence cited by Judge Yoder to support his conclusion that agent exclusivity was essential to preserve the system were statements that without common accreditation, carriers would not participate. ID at 85. We will, of course, approve the common accreditation program and as the opinion correctly points out, economic integration in those areas really produces the system's efficiencies.

A carrier authorizing a person to write tickets on its behalf remains liable to other carriers for the interline transportation they provide under existing interline agreements. This type of undertaking should provide sufficient security for other interlining carriers. If another carrier is concerned about the qualifications of the unaccredited agent or the financial viability of the authorizing carrier, then the interline agreements could be modified on a case-by-case basis to deal with the uncommon problem. Our decision on interline exclusivity tends to establish the opposite presumption. We fear that potential entrants will therefore be forced to compete with one hand tied behind their backs. The Board should be very reluctant to try to manipulate the marketplace to protect existing firms.

The dissenting statement of Member Schaffer starts from precisely the opposite policy orientation in suggesting that the Board should open the door to competition, but should define what type of competitor should be allowed into the marketing system. The fundamental principle of deregulation is that individual carrier management should be free to make ordinary business decisions without government intervention to limit competitive options. It is impossible to reconcile this philosophy with the notion that the Board should act as a gatekeeper deciding in the first instance who should be allowed to enter. Nor is it any answer that carriers have in the past agreed to constrain their competitive options by means of an intercarrier agreement. The Airline Deregulation Act specifically adopted a competitive test based on antitrust principles to insure that individual responses to marketplace conditions would supplant the former regime of collective decisionmaking.

The antitrust laws seek to preserve opportunities for competition. They do not require certain behavior, believing that it is best to let firms make individual judgments about how to best satisfy marketplace demands. The efficiencies of the travel agent distribution system are presumably obvious to air carriers, so there is every reason to believe that they will continue to use travel agents. The government need not intervene to protect consumers from the presumably irrational economic behavior of airlines, as the dissent implies.

In other areas of our economy, competition in marketing services has often produced multifaceted distribution systems. This diversity does not imply the destruction of any particular distribution mode. Rather, the availability of marketplace alternatives enhances consumer options and encourages efficiencies. It would be ironic, indeed, if the Board were to decide that competition is a good idea for the airlines but is somehow to be distrusted when it comes to travel agents. The dissent never satisfactorily explains why the Board should become involved in regulating the marketing practices of air carriers at a time when all other carrier decisions are being left to the free marketplace.

The various BTD restrictions are nothing more than a refined version of the exclusivity provisions. The 20 percent rule is designed to foreclose entry by businesses that could meet the other legitimate qualifications for accreditation; the affiliated sales and common control provisions are a collective refusal to pay for a service because of the identity of the purchaser. The carrier concerns seem to relate to revenue diversion while the travel agent parties appear intent upon preserving their favored protected position. In either event, the agreement is not required to secure the efficiencies of the program 2/ but is instead directed toward hampering competitive behavior.

The argument that carriers do not want to compensate purchasers is irrelevant. The real issue under the antitrust laws is whether competitors should be allowed to reach collective economic decisions on price and output. In the absence of demonstrable efficiencies from the agreement, independent decisionmaking is required to insure competitive performance. As with exclusivity, the decision on whether or not to deal with corporations and at what compensation levels must be an individual carrier determination. 3/ Unlike the implications in the dissents of Chairman McKinnon and Member Schaffer, disapproval of these provisions would not force carriers to pay commissions to BTD's. They would simply be prohibited from agreeing to standards that are overbroad and that unreasonably deny competitive opportunities.

In addition to these obviously unreasonable restraints, we also question whether there is any basis to justify other rules such as certain location and in plant rules that are apparently targeted at excluding BTD's. As the Board's opinion points out, the carriers can adopt collective standards, but only if they are reasonably related to improved efficiency.

Perhaps the incentives of the BTD's to attack these restraints will diminish over time. However, if a corporation is really interested in securing agency status, it cannot be unreasonably excluded from pursuing this course. The mere possibility that some or even most BTD's would be satisfied with a discount in no way mitigates a finding of unlawfulness when an otherwise qualified business is unreasonably denied access to the industry-wide system.

The dissent of Member Schaffer never explains why carriers should be allowed to limit a corporation's choices in the marketplace. There is similarly no explanation of what is wrong with a firm profiting from sales to itself. The dissent implies that it is reasonable for corporations to get price concessions through discounts but they may not acquire or establish a subsidiary to operate as a travel agent, even if it would meet other accreditation standards, sell 79 percent of its tickets to the general public, 4/ and in [illegible] indistinguishable from all other agencies. This runs counter to bas[illegible]nic and political principles that govern in unregulated sect[illegible] economy. Nothing prohibits a company from earning

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2/ See opinio[illegible] 73, [illegible]

3/ There is s[illegible] sug[illegible] the dissenting statements that these agreements are not anticompet[illegible] [illegible]oard's opinion errs, it is in not finding the sales to affiliated [illegible] be per se illegal; "An agreement that interfere[s] with the setting of [illegible] market forces is illegal on its face" National Society of Profess[illegible]neers v. U.S., 432 U.S. 679, 692 (1978). See also Catalano v. [illegible]get Sales, [illegible]6 U.S. 643, 648 (1980); Sugar Institute v. U.S.,

4/ Indeed, [illegible] ALJ recognized that the amount of self-dealing that was permitted represent[illegible] an arbitrary figure. ID at 138.

a profit on a subsidiary's sales to the parent corporation. A prohibition on self-dealing would unjustifiably deter vertical integration because the efficiencies would be lost. Such a restraint would be readily condemned in other industries as contrary to the decisional freedoms that corporations enjoy. In this case, there is absolutely no justification to condone restrictions to protect those with whom a corporate user might compete. Such protection simply does not comport with accepted legal and economic thinking.

We also believe that extension of the 20 percent rule, the in-plant requirements and the affiliated sales and common control rules for a two year period is excessive but we join the majority because there is absolutely no justification to approve the present rules for an indefinite period. The Board's opinion assumes that the anticompetitive effect of these provisions will erode over time. We would strongly urge carriers not to rely on this optimistic assessment but rather to meet the substantive objections to these provisions now.

Because carriers must have an incentive to make these and other changes, we concur in the decision to withdraw antitrust immunity, although we think that the Board may have been too solicitous in providing a two year period during which the agreements will be protected. However, the precise timeframe of the grace period is of secondary importance. Certainty is more critical to insure that the Board's decision can be effectuated. Certainty gives carriers and agents the incentive to react constructively and make the necessary changes to remove the anticompetitive features in the programs. Otherwise, there may be incentives to stall or posture in an attempt to influence regulatory judgments. We therefore believe that the Board should not sympathetically entertain requests to reconsider the withdrawal of antitrust immunity. Parties must demonstrate with substantial evidence that conditions have changed materially.

We have already reviewed a substantial amount of argument based on the benefits of the present system. We agreed with the proponents' basic argument that a system of accreditation provides procompetitive benefits and would not fail under the antitrust laws. We should, therefore, be wary about asserted public benefits that can only be achieved through anticompetitive means. Frankly, the claims about the need for antitrust immunity lack credibility in view of convincing arguments that , as modified, the agreements are not anticompetitive.

Another variant of the argument apparently is that the agreements have always enjoyed immunity, therefore they must need it. 5/ This reasoning is simply backwards. Carriers will now admittedly have to be concerned about antitrust issues when they never previously worried about the competitive impact of a provision. But this is precisely the orientation that should result from deregulation. The high cost of antitrust liability (treble damages) is set as an incentive to avoid anticompetitive behavior. We should not give immunity to avoid this cost. As in other areas that have been deregulated, a discomfort and uncertainty or overstated fear about antitrust liability is simply not enough to establish an important need for perpetual immunity.

/s/ Elizabeth E. Bailey   /s/ George A. Dalley

5/ As the Board's opinion points out, immunity was once mandatory for any agreement approved by the Board. Under deregulation, we are obliged to grant immunity only if it is necessary.

CHAIRMAN McKINNON, CONCURRING IN PART AND DISSENTING IN PART:

Agency exclusivity reduces competition in the marketing of air transportation because it tends to prevent airlines from developing innovative marketing arrangements. Airlines should be free to develop their own ticket sales networks. Therefore, a two-year transition with antitrust immunity should be granted to the agent exclusivity arrangements for interline sales and, after that time, agency exclusivity should be eliminated. Competition is what made America great and if a travel agency is good this will not endanger its business.

With regard to business travel departments and antitrust immunity, I dissent from the majority position. Business travel departments do not function as travel agents and the airlines should not be required to compensate them as travel agents. The current business travel department arrangements should not be changed because the system was carefully conceived and works well.

After careful consideration, the facts show that antitrust immunity should be granted beyond 1984 for all approved conference programs so that the many public benefits of the established programs are preserved. In a thorough discussion during the open and public Board meeting, the majority decided that the Board should reexamine the antitrust immunity issue in the event that immunity is required in the public interest because of "materially changed circumstances or important needs" that come to the attention of the Board prior to the end of 1984.

/s/ Dan McKinnon

Dissenting Statement of Member Schaffer:

I agree with the reasoning and ultimate findings of the Administrative Law Judge and, with one significant exception concerning the exclusivity provisions, would have the Board issue an order in this case which is substantially similar to his opinion.

I cannot agree with the majority that the retention of agency exclusivity, as modified by the Judge and with the further modifications I discuss below, will reduce or eliminate competition. Agency exclusivity is simply designed to insure that airlines continue to maintain control over appointment of distributors who will be representing those carriers in an agency capacity to the public.

I agree with Judge Yoder's decision to distinguish marketing exclusivity from the overall exclusivity provisions. I too would disapprove marketing exclusivity to the extent that it inhibits the development of innovative forms of marketing outside of and different from the traditional agency relationship now existing between most distributors and air carriers.

I would broaden somewhat the Ticketron exception crafted by the Judge and would allow any non-agent marketer to distribute tickets if its sales were restricted to on-line tickets only and if it did not engage in travel counselling. These conditions would avoid the pitfalls that would result from non-appointed distributors selling tickets for several carriers as part of an interline transaction and would make clear that non-agent marketers could not engage in travel counselling in the sale of solely on-line tickets. I would make continuing approval of the agency exclusivity provisions contingent upon submission by the carriers of amendments which define and clarify the non-agent marketer exception in this manner to insure that potential entrants would not be blocked from the distribution system by objections and litigation based on whether they were or were not "agents." Careful clarification of the agency and non-agency categories by such amendment would eliminate the subjective screening and marketplace uncertainty the majority fears would occur if the marketing and agency exclusivity distinctions were maintained as recommended by the Judge.

I believe that agency exclusivity, tied to common accreditation, is important to the preservation of the interline program and the confidence carriers must have in one another's agents so that interlining opportunities can remain as available to the general public as they are today. The record is clear in establishing that frequent entry into the travel agent program has occurred and continues to occur. The number of applicants who are rejected for agency appointment is minimal. As I would modify them, the exclusivity provisions are clearly not anticompetitive. The Board should not bargain away the longstanding and well recognized benefits of an exclusive agency program which does not operate to exclude competitors. On the contrary, the exclusivity provisions were established to ensure competence, professionalism, and standards of operation for admission to the travel agency program.

Those provisions have accomplished these goals well, while, at the same time, providing for the accreditation of almost 20,000 agents throughout the nation. I cannot agree with the majority that the result has been a significant reduction in competition--rather the provisions have produced a distribution system which is efficient and enjoys a high degree of public confidence. To scrap this system in order to eliminate entry barriers which do not really exist is, in my view, a serious mistake.

I also agree with the Judge's disposition of the agreements affecting business travel departments (BTD's). BTD's are clearly not agents in any legal or practical sense of the word. Travel agents stand before the public as the representatives of the airlines for which they are authorized to distribute tickets. BTD's have no such relationship to the airlines. Rather they are the purchasers of air transportation. To permit accreditation of BTD's would render any concept of agency meaningless.

It is important to remember that the agreements which preclude the accreditation of BTD's in no way inhibit the ability of BTD's to obtain price discounts from the carriers with whom they deal. Without the need for any further action on the Board's part, businesses may negotiate such discounts with carriers. The level of such discounts will be more likely to reflect market realities than would agency commission rates, which do not reflect the relative volume of business that particular customers provide to an individual carrier.

I also cannot agree with the majority's findings that these agreements are anticompetitive. The provisions affecting BTD's do not foreclose their entry into the air transportation marketing system; they properly foreclose the use of the agency system to require or coerce the payment of commissions as a discount equivalent for business travel. Contrary to the majority's contention, I have seen no evidence in the record of this proceeding which shows that these provisions have, in fact, operated to unreasonably restrain competition in the marketing of air transportation. Given this fact, I can find no reason why BTD's must be permitted to be compensated through commissions for the purchase of air transportation solely for their own use.

We certainly have the authority to find, as the Judge did, that, as modified, the agreements are not anticompetitive, but that the public interest nonetheless requires exemption from the antitrust laws to insure that the parties can proceed with these programs. The majority's decision to grant only "transitional" or limited duration immunity is shortsighted.

Although these agreements are not anticompetitive, I believe that the Board should provide continued antitrust immunity in order to protect the agreements from the potential barrage of legal challenges. The time and cost which must be expended in defending the agreements may prove to be a disincentive to participation in the ATC as well as in the Area Settlement Plan. While it may be true that the possibility of repetitious or frivolous litigation is a risk that many other enterprises in our economy must bear, the Congress has, in enacting section 414 of the Federal Aviation Act, chosen to provide the particular protections afforded by antitrust immunity to the nation's air transportation system. I believe that it is the responsibility of the Board to insure that the nature and extent of the public benefits derived from these agreements be protected from the disruptive potential that would result from prolonged and prolific litigation.

The agency which receives our responsibilities for oversight in this area will, under the majority's approach, be faced with instantaneous withdrawal of both transitional immunity and interline exclusivity as soon as it receives the underlying jurisdiction. Regardless of what might be the ultimate consequences of the majority's decision, the better course would be to let our successor develop its own expertise and judgments in this area rather than mandating an irrevocable change in the entire marketing system and the immunity it has historically enjoyed on the very day on which our successor's jurisdiction begins.

Order 82-12-85

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its offices in Washington, D.C.
on the 16th day of December, 1982

INVESTIGATION INTO THE COMPETITIVE MARKETING OF AIR TRANSPORTATION-- AGREEMENTS PHASES	Docket 36595

ORDER

A full public hearing has been held in the above-entitled proceeding, and the Board, upon consideration of the record, has issued its opinion containing its findings, conclusions, and decision, which is attached and made a part of this order.

ACCORDINGLY:

1. We approve under section 412 of the Federal Aviation Act, as amended, Agreements CAB 28217, as amended by Agreements CAB 28217-A1 through A14 and A17, insofar as it establishes ATC Resolution 90.3, to the extent placed at issue in this proceeding, except as provided in ordering paragraphs 2 and 3;

2. We approve until December 31, 1984 Agreement CAB 28217, as amended by Agreements CAB 28217-A1 through A14 and A17, insofar as it establishes the following provisions:

   a. Section I (unnumbered paragraph 3), §X.A and §XX1.A.1 of Resolution 90.3 to the extent that such sections preclude member carriers from using and compensating nonaccredited agents or other persons to write interline transportation, as set forth in the attached opinion;

   b. Section IV.A.8, §XX1.C.8 and §XVI.C.3 of Resolution 90.3; and

   c. Section XX1.L. of Resolution 90.3.

3. We disapprove Agreement CAB 28217, as amended by Agreements CAB 28217-A1 through A14 and A17, insofar as it establishes the following provisions:

a. Section I (unnumbered paragraph 3), §X.A. and §XX1.A.1. of Resolution 90.3 to the extent that those sections preclude member carriers from using or compensating nonaccredited agents or other persons to write on-line transportation, as set forth in the attached opinion;

b. Section IV.D.3, §VII.J. and K., §XIV.A.6. of Resolution 90.3; and

c. Section II. (definition of Traffic Document), §VI.C., §VIII.C., D., and E., §X.H., §XI.B., C.,F., H., and J., §XII., §XIII.A., §XIV.A. and §XXV.D. of Resolution 90.3 to the extent that they give ATC control over unilateral carrier/agent settlement.

4. We approve Agreement CAB 27010, as amended by Agreements CAB 27010-A1 through A10, insofar as it establishes ATC Resolution 90.10, to the extent placed at issue in this proceeding;

5. We approve Agreement CAB 27004, as amended by Agreement CAB 27004-A1 and A3 through A9, insofar as it establishes ATC Resolution 90.4 to the extent placed at issue in this proceeding;

6. We approve Agreement CAB 27020, as amended by Agreements CAB 27020-A1 through A2, insofar as it establishes ATC Resolution 90.20, to the extent placed at issue in this proceeding;

7. We approve Agreement CAB 27001-A5, as amended by 27001-A12 and Agreement CAB 27004-A2, subject to the condition that agreements are filed in Docket 31133 within sixty days of the service date of this order amending the agreements set out there in the following respects: that ATC require an agent to execute a personal guarantee only if the agent defaulted or where the Travel Agent Commissioner so orders and clarify the application of the provision to limited partners and corporations;

8. We approve IATA Passenger Agency Resolution 802, as amended, to the extent placed at issue in this proceeding except as provided in ordering paragraphs 9 and 10; [1]

9. We approve as discussed in the attached opinion, until December 31, 1984 IATA Resolution 802, as amended, insofar as it establishes the following provisions:

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[1] We refer to IATA resolution numbers, rather than CAB agreement numbers, because IATA resolutions have been assigned a variety of agreement numbers. This does not change the effect of our decision. With respect to both the ATC and IATA programs our grant of indefinite approval extends to all provisions placed at issue in this proceeding that we have previously approved pending its completion, unless specifically disapproved or granted limited approval.

a. Sections A(2) and (3) to the extent that these subsections preclude member carriers from using and compensating non-accredited agents or other persons to write interline transportation, as set forth in the attached opinion; and

b. Sections C(5) and G(7);

10. We disapprove IATA Resolution 802, as amended, insofar as it establishes the following provisions:

a. Subsections A(2) and (3) to the extent that those subsections preclude member carriers from using or compensating nonaccredited agents or other persons to write online transportation, as set forth in the attached opinion;

b. Sections C(14), G(2), F(6), and FF(3)(5);

c. Except to the extent otherwise disapproved, Section FF to the extent that it is mandatory for IATA members not using the Area Settlement Plan;

d. Section G(9) to the extent that it prevents carriers from agreeing to allow an agent to retain renumeration paid on refunded tickets; and

e. Sections B, E(1), FF(5), FF(7), FF(8) and FF(10), L(2) through (5), M(5) and H(3)(c) through (3)(e) to the extent that they give IATA control over unilateral carrier/agent settlment;

11. We approve IATA Resolution 876a, to the extent placed at issue, except sections (12) and (7)(c) thereof, which are dispproved;

12. We approve IATA Resolution 802d, subject to the condition that the resolution is amended within 60 days of the service date of this order to delete the words "up to" in section (3) and to provide that penalties assessed by the Commissioner may not be used to fund his office;

13. We approve IATA Resolution 802b, 802c, 802e and technical amendment 001a;

14. We approve IATA Cargo Agency Resolution 803, as amended, to the extent placed at issue in this proceeding, except, as provided in ordering paragraphs 15 and 16;

15. We approve until December 31, 1984 section A(3)(b) of Resolution 803;

16. We disapprove IATA Resolution 803, as amended, insofar as it establishes the following provisions;

a. Except to the extent otherwise disapproved, Sections G and GG to the extent those sections do not allow IATA member airlines participating in the Cargo Accounts Settlement System to either establish non-conference settlement arrangement with registered agents or to use some, but not all, of the agents, forwarders and shippers with which they do business;

b. Sections G(2)(6), G(2)(e), G(2)(f), G(3), and G(5) to the extent they preclude less frequent reporting and remitting schedules;

c. Sections G(9)(b), GG(8)(a) and GG(8)(d)(ii) to the extent those provisions preclude acceptance by members of less than tariff amounts in full satisfaction of their claims;

d. Sections G(7)(c)(iii) and GG(8)(a) to the extent those provisions require conference action where a bona fide commercial dispute exists between a member and an agent in default;

e. Except to the extent otherwise disapproved, Sections G(6)-(9) to the extent that those provisions grant IATA control over traffic documents and related materials furnished to agents by individual member airlines; and

f. Sections D(1)-(4), D(7), D(10), D(11), F(1)(c), G(2)(c) and G(2)(d), G(8)(a), G(9)(e), and GG(6)(g)-(i);

17. We approve IATA Resolution 803a to the extent placed at issue except sections (4)(g)(4)(i), (4)(j) and (4)(k), thereof;

18. We approve IATA Resolution 850a, to the extent placed at issue in this proceeding, on the condition that any registered agent that makes every effort to ascertain the proper rate shall have a complete defense to alleged violations of that section;

19. We approve IATA Resolution 801, to the extent placed at issue, except section (8)(21) thereof, which is disapproved;

20. We approve IATA Resolution 851, to the extent placed at issue in this proceeding, subject to the condition that the Cargo Accounts Settlement System is available for use by airlines with some, but not necessarily all, of its agents;

21. We grant IATA's motion to withdraw Resolutions 853 and 851a (formerly 807 and 823) from further consideration in this proceeding;

22. We approve technical amendments 001jj and 002, Resolutions 811, 801c, 803c and 813, to the extent placed at issue in this proceeding;

23. To the extent that agreements are approved, we exempt any person affected by this order from the operation of the antitrust laws until December 31, 1984, as provided in section 414 of the Act;

24. We grant the motions of Hawaiian/Aloha and Northwest for leave to file unauthorized documents;

25. We grant the motions of ATC, ASTA, ATN, BOA, IATA and IAAA to correct the transcripts of the oral argument;

26. We grant ATC's motion to mark for identification and receive into evidence a post oral argument exhibit;

27. We deny all other applications, motions, and other requests, except to the extent that they have been granted here; and

28. This investigation is terminated, except to the extent specific amendments are required.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

APPENDIX A

DOCKET 36595

THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE.* THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

*SERVED: June 1, 1982

Appendix B
Page 1 of 1

TRAVEL AGENTS' SHARE OF VARIOUS CARRIERS' DOMESTIC PASSENGER SALES

	Passenger Sales-1979			
Carrier	Travel Agents (000)	All Other (000)	Total (000)	Percent Travel Agent
Air California 1/	$ 43,456	$ 62,786	$ 106,242	40.9%
Air New England 1/	9,900	21,524	31,424	31.5
American Airlines	1,467,748	1,386,127	2,853,875	51.4
Continental	355,780	321,077	676,857	52.6
Delta Airlines	816,519	1,205,340	2,021,859	40.4
Eastern Airlines	1,139,235	1,164,550	2,303,785	49.5
Frontier Airlines	120,052	153,615	273,667	43.9
Hawaiian Airlines	54,986	25,910	80,896	68.0
Hughes Airwest	145,870	120,592	266,462	54.7
Northwest Airlines	285,891	235,872	521,763	54.8
Pan American 1,2/	344,000	219,000	563,000	61.1
Trans World	1,071,072	500,514	1,571,586	68.2
United Airlines 3/	2,011,000	1,846,000	3,857,000	52.1
U.S. Air	264,700	237,000	501,700	52.8
Western Airlines	388,126	284,354	672,480	57.7
Wien Air Alaska	10,510	37,571	48,081	21.9
Total:	$8,528,845	$7,821,832	$16,350,677	52.2%

1/ Data based on 1979 statistics rather than 1978.
2/ Figure based on "direct airline sales" rather than "all other sales."
3/ Figure based on "dollar volume of United States."

Source: Exhibit TKTN-213.

Appendix c
Page 1 of 1

TRAFFIC COMMISSIONS AND OPERATING REVENUES
TOTAL CERTIFICATED INDUSTRY
($ MILLIONS)

Calendar Year	Operating Revenue ($ Millions)	Total Traffic Commissions ($ Millions)	Traffic Commissions As A Percent of Operating Revenue
1970	9,289.7	262.0	2.8
1971	10,045.6	294.9	2.9
1972	11,163.3	360.9	3.2
1973	12,418.8	442.1	3.4
1974	14,703.2	508.6	3.5
1975	15,356.3	586.2	3.8
1976	17,505.6	745.7	4.3
1977	19,926.4	847.9	4.3
1978	22,892.1	1,024.5	4.5
1979	27,227.0	1,322.9	4.9
1980	33,727.8	1,788.0	5.3
1981	36,502.2	2,166.3	5.9
1982*	36,235.0	2,264.6	6.2

* 12 months ended 6/30/82.

Source: CAB Form
41 data

Appendix D
Page 1 of 1

	# of Agts.	Total fares sold without taxes thru ASP (000)	Total comm.	Average comm. on ticket
1977	13,454	8,797,772	732,364	8.3
1978	14,804	10,842,314	895,486	8.3
1979	16,112	13,991,395	1,176,138	8.4
1980	17,339	17,189,748	1.353,831	8.9
1981	19,203	19,335,268	1,850,941	9.6

Source ATC Conference Bulletins
#6 3/19/79
#91 3/28/80
#72 5/7/82

A. The ATC and IATA financial rules are as follows:

ATC - Resolution 90.3 SC

1. The Agent will,..., maintain,...a bond or bonds...in the minimum amount of $10,000, such amount to be increased whenever necessary to cover [one months sales] ...for the account of members of the Conference: However, (a) the Agent is not required to maintain said bond in amount in excess of $50,000; (b) the Agent shall be relieved of the requirement to provide coverage in excess of the $10,000 minimum if:

   (i) The Agent is operated by a bank as a special department, or

   (ii) The Agent submits to the Administrator annually a current balance sheet, ... which establishes that total assets available for satisfaction of debts exceed liabilities by at least $75,000, and the credit rating of the Agent, if published by Dun and Bradstreet or other recognized credit-rating agency, is shown as "good" or higher.

2. After the Agent has been on the Agency list for one year, adjustment of the amount of the bond to provide coverage in excess of the $10,000 minimum shall be made at least once a year, and at any other time when the amount of the Agent's bond fails by $2,000 or more to provide the required coverage. Nothing herein shall be deemed to preclude an Agent from reducing the amount of coverage whenever consideration of his sales experience for the most recent twelve consecutive months shows him to be carrying a bond in excess of that herein required.

3. After the Agent has been on the Agency list for one year, the Agent may substitute an irrevocable bank letter of credit (in a form to be prescribed by the Administrator) for the bond required herein. Such letter of credit shall at all times be in an amount at least equal to the amount of the bond required herein and shall be adjusted in accordance with subsection 2. above.

4. In lieu of the bond, an applicant may submit an undertaking by a surety that it will issue such bond upon receipt of notice that the applicant has been found eligible for inclusion on the Agency list.

IATA - Resolution 802, D

(1) the applicant must provide a statement of assets and liabilities...showing that the Agent is solvent and of a satisfactory financial standing to meet his financial obligations.

(2) the following considerations will be observed by the Agency Administrator in respect of an application for inclusion on the IATA Agency List:

(a) Working Capital

(i) Application for Home Office Location:

the applicants...current assets must exceed the current liabilities by an amount of not less than $15,000,

(ii) Application for Branch Office Locations:

the Home Office Financial statement must be included...the current assets must exceed the current liabilities by an amount of not less than $15,000 for the Home Office Location, plus $5,000 for each Branch Office Location,

* * *

(b) Shareholder's Equity or Capital

in the case of a stock coporation, investment of the principals in the Agent must not be less than $20,000 in net worth;

* * *

B. In addition, ATC has requested approval of a personal guarantee requirement that would take effect to cover losses in excess of the Agent's bond in the event of default. ATC would amend the passenger agency resolution to incorporate the following language:

5. In addition to the requirements and conditions specified above, any restoration of [ticketing materials] ...shall be conditioned upon the Agent's causing to be executed and filed with the Executive Secretary a "Guarantee of Performance of Agent's Agreement", Schedule E. of Resolution 90.2.

* * *

E. (1) A "Guarantee of Performance of Agent's Agreement", as set forth in the Schedule E of the Sales Agency Agreement, shall be executed by (a) persons who are added as Agents to the Agency List, (b) applicants for change of ownership pursuant to this Resolution, (c) Agents who are declared in default pursuant to Section VIII.A. of this Resolution, and, upon demand, failed immediately to provided a certified check(s) in replacement for a dishonored check(s), or fail immediately to provide a missing sales report(s), and (d) Agents who are required by the Commissioner...

(2) Obligors on such Guarantee shall include:

a. all persons having a stock or other beneficial interest of 50 percent or more in applicant, or Agent, as the case may be, and all officers, directors or employees having a stock or other beneficial interest of 10 percent or more in applicant, or Agent, if such is a corporation; or

b. each partner and the spouse of each partner, if applicant or Agent is a partnership; or

c. the spouse of applicant or Agent which is a sole proprietorship."

* * *

* A Personal Guarantee of Performance of Agent's Agreement Supplement is appended hereto and incorporated herein. Such guarantee shall be separately executed on behalf of the Agent when such guarantee is required pursuant to Section XVII of the Air Traffic Conference Agency Resolution...

C. The ATC and IATA provisions concerning honesty are as follows:

ATC Resolution 90.3 §IV.D.

General Qualifications

1. The applicant is ineligible for inclusion on the Agency List where investigation reveals, or the Administrator has reason to believe, that there is a material misrepresentation or inaccuracy in the application of any attachments thereto, or, that such applicant fails to meet the requirements of this agreement.

2. The applicant is ineligible for inclusion on the Agency List if the Administrator has reason to believe that the applicant, or any person holding a financial or ownership interest in the applicant, or any officer of the applicant or the qualifying manager, or any person employed by it in any capacity:

* * * *

c. Has been convicted of a felony or a misdemeanor related to financial activities or a breach of fiduciary duty involving the use of funds of others; or,

d. Has been denied application for a travel agent license by an governmental authority, or has had a travel agent license suspended, revoked or cancelled by any governmental authority, or, unless, based upon investigation, experience of the mergers with such person(s), where applicable, and all information and facts available, it is determined by the Administrator that the applicant can be relied on to adhere to the terms of this agreement.

IATA Resolution 802 SC

Qualifications for Approval and Retention

Any person may become an Approved Agent by meeting the following qualifications and submitting an application to the Agency Administrator in the prescribed form. The qualifications must continue to be met in order to ensure retention as an Approved Agent (in which event the term "applicant" where used in this Section shall be understood to include an Approved Agent.

* * *

(8) the applicant and those who direct its operations, has not been found guilty of wilful violations of fiduciary obligations to the public or to airlines.

* * *

(10) all material statements made in the application are accurate and complete.

* * *

(15) no applicant shall be included on the Agency List where any person holding a financial interest in the applicant or employed by the applicant holds or has held a financial interest in or a managerial position with an Agent which is presently under suspension or pending action of any kind by the IATA Travel Agency Commissioner unless based upon investigation and all information and facts available, it is determined that the applicant can be relied on to adhere to the terms of the Passenger Agency Agreement.

D. The competency or personnel provisions are as follows:

ATC Resolution 90.3 §IVB

The applicant shall have at least one person who is employed full time (and at least 35 hours per week) at the place of business, and is either the owner, partner, officer or manager who fulfills each of the following qualifications:

1. Exercises daily supervision of, and responsibility for the operations of that agency location and has the authority to make management decisions therefore;
2. Demonstrates a working knowledge of the ATC Travel Agent's Handbook by successfully completing a written questionnaire;
3. Has at least two years' experience of full-time employment as a travel counselor or a manager in the passenger transportation business; and
4. In addition, the foregoing person or another full-time employee of the applicant staffing the location for which the application is intended has had, within the past three years, one year's experience in airline passenger ticketing in the full-time employment of either an ATC or IATA member airline, or a travel agency included on the ATC or IATA Agency Lists. One year's experience in an ATA or IATA member airline or a travel agency included on the ATC or IATA Agency List working with automated ticketing equipment will meet this requirement. Any tenure of service with one employer for less than six months will not be considered towards meeting this requirement.

Paragraphs 1 through 3 establish ATC's managerial requirements--paragraph 4 its ticketing requirements. ATC defines travel counselor as "...any individual . dealing with the general public in the promotion or sales of general travel services, such as tour, cruise, hotel and air arrangements." (ATC Res. 90.3 §II).

IATA Resolution 802, §C

"Any person may become an approved agent by meeting the following qualifications...

* * *

(3) at least one person who is employed full-time at the location for which application is made and is either the owner (including any one partner or stockholder with at least a 30% ownership interest), or the manager (who exercises daily supervision of all operations of the Agent) must fulfill each of the following qualifications:

(a) demonstrate knowledge of the Resolutions, rules and procedures contained in the IATA Travel Agent's Handbook; and

(b) have at least two years' experience of full-time employment as a travel counselor or manager in the travel business.

(4) there must be at least one person employed full-time who is engaged in writing tickets or supervising those who write tickets and that person must have had at least one year's experience within the past three years of full-time employment in an Approved Agent or in an airline office, and whose employment included writing tickets."

(Paragraph 3 established IATA's managerial requirement and paragraph 4 its ticketing requirement.

IATA does not include a definition of travel counselor in its resolutions.

E. The location provisions are as follows:

ATC Resolution 90.3 §A

A. LOCATION AND OTHER QUALIFICATIONS

The applicant, to be included and retained on the Agency List, must meet each of the following qualifications:

1. Be advertised and otherwise represented as an office for the sale of air passenger transportation and services related thereto, and be so identified to the public;
2. Have a name which is not the same as, or misleadingly similar to, an airline, and not be identified as an airline office;
3. Be open and freely accessible to the general public for the promotion and sale of general travel services, such as tour itineraries, sightseeing arrangements, and hotel reservations;
4. Be open for business on a regular schedule and no less than 35 hours per week or, upon review and approval of specific circumstances by the Administrator, on a regular shorter schedule in accordance with local business practices;
5. Have facilities or arrangements necessary to insure security of tickets and validation plates, as set forth in Attachment B of this agreement;
6. Be engaged solely in the promotion and sale of passenger transportation and general travel services. The words "engaged solely in" apply only with respect to the office, department or space which the applicant purports to be the place of business.
7. (Deliberately left blank)

IATA Resolution 802 §C

"Any person may become an approved agent by meeting the following qualifications...

* * *

(5) the place of business for which approval is sought, or has been granted, is indentified as a travel agency, is open for business on a regular schedule in accordance with local business practices and freely accessible to the general public for the sale of international air transportation, and does at least 80% of its business with members of the general public.

(6) the applicant shall not be located in office space jointly occupied with another travel agency, an Approved Agent or an air carrier.

(7) the applicant does not have a name which is the same as, or is misleadingly similar to, that of an IATA Carrier or IATA. The place of business must not be identified as an airline office.

* * *

(12) the applicant meets the standards for security of Traffic Documents and Airline identification plates set forth in the IATA Travel Agent's Handbook.

Order 83-3-127

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 24th day of March, 1983

INVESTIGATION INTO THE COMPETITIVE : MARKETING OF AIR TRANSPORTATION -- : AGREEMENTS PHASES :	Docket 36595

ORDER ON RECONSIDERATION

On December 16, 1982 we adopted a final opinion and order in this proceeding. We decided, among other things, that systems of delegating responsibility to air carrier trade associations to screen prospective common marketing agents in accordance with industry standards were basically procompetitive and should be approved. Specific aspects of these systems, however, were found to significantly reduce competition. The most important of those are the so-called exclusivity provisions which prohibit the use and compensation of persons, other than common agents and members' direct marketing outlets, for the sale of air transportation. These provisions adversely affected competition by eliminating rivalry in marketing methods and the possibility of entry through the use of other forms of marketing.

We noted, however, that interline agreements which permit one carrier's marketing network to write air transportation on another carrier, were entered into at a time when the exclusivity provisions were in place. We did not regard exclusivity as a necessary precondition to interlining because air carriers, under existing agreements, assume financial responsibility for tickets written in their name. But we recognized that carriers might wish to make adjustments in their interline arrangements in light of our decision. We therefore decided to continue to approve, until December 31, 1984, the exclusivity provisions to the extent they preclude member carriers from compensating non-accredited agents for writing interline transportation, absent an agreement between or among carriers authorizing such sales. 1/

We also decided that, except in limited circumstances, the agreements we approved do not require protection from the operation of the antitrust laws. 2/ Nevertheless, we granted antitrust immunity under §414 until December 31, 1984 to afford carriers an opportunity to review their agreements in light of our decision and make additional modifications that they may feel are necessary.

1/ Our transitional measures are described in greater detail below.

2/ We found that antitrust immunity was required with respect to interline exclusivity and certain other provisions approved until December 31, 1984.

We have received petitions from several parties asking us to reconsider a number of our conclusions. Those of the American Society of Travel Agents (ASTA), Associated Travel Nationwide (ATN), the Association of Retail Travel Agents (ARTA), and the International Air Transport Association (IATA), collectively the "proponents," argue that our decision to disapprove exclusivity should be reversed because it is founded upon a misunderstanding of the applicable statute and is contrary to the weight of evidence in the record. 3/ Most of the proponents also suggest that there were procedural defects in reaching our decision and that the only way to correct them is to vacate our decision. The proponents and the Air Traffic Conference of America (ATC) believe, that at a minimum, our decision on exclusivity should have been deferred and additional time provided for filing petitions for reconsideration.

The same parties ask us to reconsider our decision to end antitrust immunity on December 31, 1984. ASTA and IATA insist that a proper legal analysis of the agreements under §412 would make antitrust immunity mandatory. They and the other proponents argue that, in any event, indefinite immunity is required by the public interest. Finally, they ask us to grant antitrust immunity for at least a three year period, so that the agency to which our antitrust powers are transferred will be able to reconsider the issue.

The National Passenger Traffic Association (NPTA) argues in its petition that it was improper to approve any exclusivity provision, even for only two years, and that antitrust immunity should be withdrawn immediately.

The American Express Company and the International Airforwarder and Agents Association (IAAA) have filed petitions in which they ask that we clarify our order. The petition of IAAA is not opposed. The request of American Express, however, has generated a number of supporting and opposing answers. In its petition, it asks that we clarify whether we intended to permit accredited travel agents to also negotiate directly with air carriers. Stated another way, it asks whether we intended to permit agents to hold dual statuses.

For the reasons set forth below, we will affirm our disposition of the issues in this proceeding and deny the requests for modification of our final order of ATC, ATN, ASTA, ARTA, IATA and NPTA. We have carefully considered the arguments these parties make in support of their positions. The new arguments that have been raised do not convince us that there are legal, substantive or procedural errors that warrant a result different from that reached in Order 82-12-85. We will, however, grant American Express' and IAAA's requests that we clarify our opinion, to the extent set out below.

3/ The filings of ASTA and IATA were accompanied by motions to expand the page limitations for petitions for reconsideration. We will grant their motions.

LEGAL STANDARDS

A. Application of Section 412

A number of parties, particularly IATA, argue that we have misapplied section 412 of the Act. That provision governs the approval of carrier agreements that have been filed for Board approval. It provides that we must disapprove agreements we find are adverse to the public interest. In addition, we must disapprove an agreement if we find that it may substantially lessen competition, unless we find that it is necessary to meet a serious transportation need or to secure important public benefits, and such needs cannot be met or benefits secured by reasonably available alternative means having materially less anticompetitive effects. In this proceeding we have focused on the second "competition" test because virtually all the challenges to the agreements are founded upon their effects on competition. [4/]

In our order, we found that the competition test of section 412 requires a three step analysis. First, an agreement's effects on competition are examined. Adverse effects on competition are weighed against any procompetitive effects. At this stage only effects related to competition are considered. [5/] If we find that an agreement is not likely to substantially reduce competition, our analysis ends.

However, if we find that an agreement substantially reduces competition, section 412 provides for a further inquiry. We must consider whether the agreement should nevertheless be approved because it is necessary to

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[4/] In its answer to various petitions, ASTA asserts that our staff was prejudiced against its position in this case. One of its grounds for asserting prejudice is a discussion of the two tests for disapproval of agreements in section 412 that appears in a "For Information" memorandum released to it under the Freedom of Information Act. ASTA apparently misinterprets passages of the memorandum. A portion of it states that it is IATA's and ASTA's position that "at most" a "perfunctory competitive analysis" is required under section 412. ASTA Answer at 2. While ASTA apparently believes the statement was made with respect to the second test in section 412, the statement was clearly addressed to consideration of competition among the other policy considerations under the general public interest test. In any event, that was ASTA's position. ASTA Brief to Judge Yoder at 9. See also IATA Brief to Judge Yoder at 16. Orders 79-12-163/164/165 at 59 are to the same effect.

[5/] Courts reviewing agreements under section 1 of the Sherman Act do not consider effects unrelated to competition in their analysis. National Society of Professional Engineers v. U.S., 435 U.S. 679, 690 (1978). Our first inquiry under section 412, then, is essentially the same as a court would undertake. While the standards of §1 of the Sherman Act and §412 are similar, they are not identical. We can draw on antitrust precedent for guidance in making our initial competitive determination, but recognize that Congress intended to allow us to bring our special expertise to work on agreements we consider under §412. See U.S. v. Third National Bank of Nashville, 390 U.S. 171, 189 (1968).

meet a serious transportation need or to secure important public benefits. In our order we indicated that it would be at this stage that public benefits unrelated to competition would be considered. The agreement can only be approved if we also find that these benefits or transportation needs cannot be obtained through the use of any reasonably available less anticompetitive alternatives. If we find that they cannot be obtained through materially less anticompetitive alternatives, the agreement must be approved and antitrust immunity must be conferred under §414.

IATA finds error in this step-by-step analysis. In its view, §412 provides for a very simple balancing of the pros and cons of an agreement. This balancing is "triggered" by an attack on an agreement as being anticompetitive or the Board suggesting it has concerns about the competitive effects of an agreement. [6] IATA claims that:

> "If the Board cannot find that approval is in the public interest because an agreement raises substantial competitive questions, section 412 simply requires that the Board array the agreement's public benefits against identifiable less anticompetitive methods of achieving those same benefits." [7]

As IATA interprets §412, competition related benefits and those unrelated to competition are considered together. As we understand its views, where there are public benefits, we must weigh those against the possibility of obtaining these benefits through the use of materially less anticompetitive alternatives.

We cannot accept IATA's interpretation, for a number of reasons. First, it relegates competition to coequal status with the other factors to be considered in our §412 analysis. The Airline Deregulation Act directs us to rely on competition to the greatest extent possible in the exercise of our regulatory powers. [8] The legislative history of the ADA uniformly supports this interpretation. It indicates that we are to stress competition, [9] that we are expected to undertake a careful review of agreements under the antitrust laws,[10] and that the section is patterned on the Local Cartage test[11] and the revised airline merger standard[12] which focus on competition. Second, §412 clearly contemplates a step-by-step approach. By its terms, it places the initial burden of producing evidence on the anticompetitive effects of an agreement on opponents of the agreement.[13] Moreover, the plain wording of section 412 states that we are not required to consider transportation needs or public benefits until after we have made a determination that an agreement may substantially reduce competition. Indeed, IATA's own structure requires an initial analysis focusing on competition.[14] Finally, adoption of IATA's approach would make it impossible to rely upon judicial precedent under section 1 of the Sherman Act for guidance as to an agreements likely competitive effects. Our conclusions would be the undisciplined results of open-ended balancing of widely different factors. As we have already indicated, Congress acted decisively to restrict our ability to override the pre-eminent position of competition in the deregulation scheme.

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[6] IATA maintains that this threshold requirement is met by our Instituting order in this proceeding which suggested competitive concerns.

[7] IATA Petition at 4. Emphasis in the original.

[8] Section 102(a)(4) of the Act, as amended, 49 USC §1502(a)(4), provides:

> "(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless, of material differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other."

[9] H.R. Rep. 95-1211, 95th Cong. 2d Sess. (1978) at 5-6.

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[10] "These changes are necessary to prevent the Board from approving and thus immunizing agreements which will have significant anticompetitive effects while assuring that air carriers will be able to enter into agreements designed to promote a strong, more competitive and convenient air transportation system. At the outset, it should be noted that both the Department of Justice and the Civil Aeronautics Board have testified that the enactment of stricter standards governing inter-carrier agreements should have no effect on the day-to-day operation of airlines. Under the antitrust laws, agreements designed not to eliminate competition among carriers, to permit firms to provide service on an integrated nationwide basis that they could not provide alone are not unlawful if they are designed to avoid unnecessary, incidental anticompetitive effects." S. Rep. 95-631, 95th Cong., 2d Sess. (1978) at 82-83.

[11] H.R. Rep. 95-1211, 95th Cong. 2d Sess. (1978) at 18. Admittedly the test established in the Local Cartage case, 15 C.A.B. 850, 852-53 (1952), was often inconsistently applied. During the heyday of regulation, despite the literal terms of the test, we nominally gave weight to competitive concerns, but subordinated competition to other goals. For example, this was true with respect to the capacity agreements. See U.S. v. CAB, 511 F.2d 1315 (D.C. Cir. 1975). Given the clear policy directive of the ADA and its legislative history, Congress intended that we consistently apply Local Cartage to place our principle reliance on competition.

[12] S. Rep. 95-631, 95th Cong., 2d Sess. (1978) at 83.

[13] IATA's interpretation is inconsistent with judicial interpretation of the related Bank Merger Act test, while ours is not. U.S. v. Third National Bank in Nashville, 390 U.S. 171, 182 (1968).

[14] But nothing in the Act or its legislative history supports IATA's characterization of this initial inquiry as a trigger to an open-ended balancing of all benefits of an agreement.

IATA's principal argument in support of its position is that our interpretation of §412 in this case deviates from our previous statements of governing law. It cites a portion of our decision in the IATA Show Cause Proceeding to support its view. [15] Nothing in that order supports IATA's position. The language it cites is merely an alternate statement of the approach we have adopted. [16] Moreover, in the order in which we rendered our final decision in the IATA Show Cause Proceeding, we specifically rejected the argument that benefits unrelated to competition must be taken into account in determining whether an agreement substantially reduces competition. [17]

IATA also argues that our approach, with its reliance on competition, will make it impossible for anyone to obtain "meaningful approvals (those with antitrust immunity) as Congress intended." [18] IATA argues this approach was found to be unlawful in U.S. v. CAB. [19] IATA apparently believes that if we merely approve an agreement without also conferring antitrust immunity, our decision is tantamount to an advisory opinion.

We reject IATA's argument. The effect of its interpretation would be to require us to grant immunity in every case in which an agreement was approved, regardless of the basis for our approval. In short, IATA would have us find that competitive features or benefits of an agreement can be invoked to secure a mandatory antitrust exemption because in its view, the only approval that is meaningful is one that conveys immunity.

Adoption of this legal interpretation would effectively repeal the statutory changes made by the ADA. Congress in amending §414 clearly provided that we may withhold antitrust immunity where it is not necessary. Prior to the Airline Deregulation Act, antitrust immunity automatically atached to agreements approved under §412. With its enactment, we gained the discretion to withhold it. 20/

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[15] IATA Petition at 7, quoting Order 80-4-113 at 28.

[16] "[I]nitial inquiry must be made into the competitive implications of a filed agreement. If the agreement is found to contain anticompetitive features -- to be 'plainly repugnant to antitrust principles' or to 'substantially reduce or eliminate competition' -- then we are precluded from granting approval without further consideration. In both instances, approval may be found warranted notwithstanding anticompetitive findings if we find in addition that the agreement is necessary to meet a serious transportation need or to secure important public benefits and we do not find that there are less anticompetitive alternative means to meet such need or to secure such benefits which would not unduly sacrifice other public interest values." Order 80-4-113 at 28.

[17] Order 81-5-27 at 7, May 6, 1981.

[18] IATA Petition at 12.

[19] 511 F.2d 1315, 1322 (D.C. Cir. 1975).

The amendments were intended to limit the instances where antitrust immunity is granted. If approval without immunity is an empty gesture, as IATA argues, Congress would not have amended §414 to eliminate the automatic conferral of immunity upon Board approval of an agreement. In amending §414 to require specific findings, in addition to those of §412, Congress recognized that some approved agreements would not receive antitrust immunity. This result was intended. 21/

Our consistent interpretation of §§412 and 414 has, contrary to IATA's implications, resulted in just the type of flexible decisionmaking that Congress envisioned in codifying a more stringent standard for approval and enabling us to tailor antitrust relief to the facts at hand. Our approach has not, in fact, precluded us from approving most of the agreements in this case or in many other cases that have come before us. Nor has it precluded us from finding agreements to be anticompetitive but necessary to secure public benefits or meet transportation needs. We have made such findings in a number of cases. In those instances, antitrust immunity was granted as required by the Act. 22/

Nor is approval without immunity meaningless. Especially after lengthy procedures as in this case, we believe that our findings will be given significant deference by a court that may subsequently review the agreement. Admittedly our decision will not prevent subsequent antitrust challenge. However, the reviewing court will have to consider our special expertise in the air transportation industry and find significant error in our findings on an agreements' likely competitive consequences.

The case of U.S. v. CAB lends no support to IATA's position. In that case, DOJ argued that we could not approve an agreement that we found to be anticompetitive but that provided important public benefits, unless we found that it was impossible to obtain those benefits through the use of any materially less anticompetitive alternatives. The court rejected the

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20/ Section 414 requires only that antitrust immunity be extended to agreements that we find to be anticompetitive but approve because they serve transportation needs or provide public benefits that cannot be obtained by materially less anticompetitive alternatives.

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> "H.R. 12611 limits section 414 immunity in several respects. First, the bill clarifies that section 414 immunity is limited to the antitrust laws. Second, the bill provides that immunity shall be granted only insofar as is necessary to permit completion of transactions specifically approved by the Board, or transactions necessarily contemplated by a Board order. Third, the bill provides that the grant of antitrust immunity is discretionary with the Board and that the Board in granting immunity must find the grant to be in the public interest." H.R. Rep. 95-1211, 95th Cong., 2d Sess. (1978) at 18.

22/ Orders 81-5-27, 82-6-168, 82-1-47, and 79-1-161.

impossibility test as too rigorous and inconsistent with the substantial discretion the then existing §412 vested in the Board.[23]

Our disapprovals in this case are not based upon the existence of materially less anticompetitive alternatives. Rather, we have found that the provisions substantially reduce competition and are not necessary to obtain public benefits or to serve transportation needs.[24] Moreover, our competitive analysis is very similar to that which applies to agreements in other industries, consistent with the ADA amendments to section 412. The court in *U.S. v. CAB* was not considering the revised statute or its reordered priorities in agreements cases.[25]

B. Review of Specific Provisions

IATA also maintains that we cannot review individual provisions of its resolutions. In its view, the exclusivity provisions, for example, are a portion of a single agreement governing the passenger sales agency program. If we find there are procompetitive benefits to the common accreditation, as we did, those benefits must be attributed to exclusivity as well.

IATA's argument has no merit. Since at least 1948 we have consistently held that we have the right to disapprove individual provisions of agreements.[26] This conclusion was subsequently upheld in the courts.[27]

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[23] 511 F.2d at 1320-21.

[24] Even if we had conducted the analysis IATA suggests, the record establishes that a less anticompetitive alternative -- a non-exclusive system -- is reasonably available. The availability of alternatives must rest on our judgment about what elements of an agreement produce its asserted benefits. IATA's suggestion that our reliance on competition renders any other structure "not reasonably available" is designed to deny us this discretion. In this regard its demand that the existence of identifiable alternatives be proven, when an industry agreement has precluded their very existence, would create a variant of the impossibility standard rejected by the Court decision upon which IATA relies. *See National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819, 831 (D.C. Cir. 1980) and *Standard Oil Co. v. U.S.*, 377 U.S. 293, 308-10 (1949).

[25] The finding of the court is consistent with the revised statutory language that requires that we find materially less anticompetitive alternatives are not *reasonably available* before approving an anticompetitive agreement.

[26] *Air Cargo, Inc. Agreement*, 9 CAB 468 (1948).

[27] *McManus v. CAB*, 286 F.2d 414, 419 (2nd Cir. 1961). *cert. denied* 366 U.S. 928 (1961).

IATA's reliance on Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., [28] is misplaced. The Court there specifically found that the price restraint at issue was a necessary consequence of the integration efficiencies of an aggregate license. [29] The crucial finding in BMI was a relationship between the procompetitive benefits of an agreement and the challenged restraint. The determination whether a particular restraint is reasonable and necessary to achieve procompetitive benefits or whether the activity unduly restrains competitive interplay depends entirely upon an analysis of competitive effects in a particular factual context. For example, restraints that were alleged to produce efficiencies were struck down recently in Arizona v. Maricopa County Medical Society. [30]

We very carefully considered the relationship of exclusivity to the benefits of common accreditation. We found that

> "the exclusivity provisions do not themselves produce efficiencies nor are they necessary to achieve the efficiencies of common accredition. Rather, they constrain competition among airlines, between carriers and agents, and among marketing outlets. Industry-wide agreements with those objectives and effects are not tolerated under traditional antitrust policy." [31]

Just as important, acceptance of IATA's view would lead to intolerable results. Parties may incorporate unreasonable and unnecessary restraints on competition in agreements that produce significant public benefits in order to insure that the "balancing" of effects occurs. We would be able to reach offensive elements only by finding that the entire agreement should be disapproved because the agreement without the offensive provisions was a materially less anticompetitive alternative. [32] This disapproval, however, would extend to all components of the agreement. Parties would be unable to act in reliance on any aspect of the agreement, even though our disapproval related to a limited concern.

Furthermore, IATA's basis for arguing that exclusivity is a part of a single agreement apparently is based on the fact that virtually all of its rules governing the passenger agency sales program are contained in a single resolution, Resolution 802. That resolution is not, however, the product of a single meeting of the minds of its members. Rather, it is the end result of almost 40 years of IATA meetings, with repeated amendments, revisions, deletions and simplifications. It is only a single agreement because IATA has labeled it as such. [33]

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[28] 441 U.S. 1 (1979).

[29] 441 U.S. at 21-22. The Court merely found the provision did not warrant per se treatment. In another case, involving the same provision, it was struck down as an unreasonable restraint because of the absence of viable alternatives to the blanket license. Buffalo Broadcasting Corp. v. ASCAP, 1982-2 Trade Cases, ¶64,898, (S.D. N.Y. August 19, 1982).

[30] ___ U.S. ___, 102 S.Ct. 2466, 2477 (1982).

[31] Order 82-12-85 at 38.

[32] Given the substantial adverse effects of exclusivity, such a finding would be justified in this case.

COMMON ACCREDITATION

No party challenges our generic finding that adoption of common accreditation systems such as those at issue in this case is neither adverse to the public interest nor a substantial restraint on competition. In fact, we found that, on balance, competition in the air transportation industry was improved by reasonable standards governing the selection and retention of common agents. We found that the delegation of responsibility to screen applicants, monitor their activities and take enforcement action where conference rules are violated has resulted in the virtual integration of air carrier member marketing activities, at least through agents. Duplication in the creation and oversight of agent networks has been eliminated by the delegation of responsibility over agent distributors to carrier trade associations. Thus, carriers can take advantage of the inherent economies of a system where costs are spread over a large base. [34]

We also found that common accreditation increases competition by facilitating carrier entry into new markets, by eliminating duplication in agent accreditation costs, and improving the price and service information available in the marketplace. [35] IATA and most other parties to this proceeding, as well as the presiding administrative law judge, agree with our conclusions about the efficiency properties of these cooperative activities. However, IATA objects that we have arbitrarily categorized some as competition related in order to avoid the general balancing of all benefits required by §412 and the mandatory conferral of immunity that attaches whenever an agreement is approved after such balancing occurs.

We have already explained why we believe IATA's statutory construction is improper. When agreements do not substantially reduce competition, the possible existence of public benefits that might also warrant approval of the agreement does not affect our finding under section 412 that the agreement should be approved. The interpretation urged by IATA would, however, effectively remove the Board's ability to withhold antitrust immunity, even after an implicit finding that it is not necessary to enable the transaction to proceed.

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[33] Another legal argument raised by various parties is that opponents of the agreements, who bear the burden of proving that an agreement will have a substantial adverse effect on competition, have not met their burden of proof. In their view, the opponents' burden is only met if they show actual measurable harm to competition. These parties merely assert that we are in error but make no effort to refute our lengthy discussion of this issue at pages 26 and 27 of our opinion. For the reasons set out there, we affirm our holding that opponents of agreements may rely on economic testimony as well as established antitrust principles to carry their burden of proof. The cases cited in footnote 24, supra, are to the same effect.

[34] Order 82-12-85 at 35.

[35] Order 82-12-85 at 36-37. We also found, however, that common accreditation systems also act to reduce competition in some ways, particularly because it tends to chill individual carrier incentives to devise more efficient methods of distribution.

Nor have we failed to consider all the alleged benefits of the agreements, as IATA maintains. IATA would have us consider only whether an agreement produces some desirable effects. It would not distinguish between those effects relating to competition and other effects. However, we think a more probing analysis is required. In applying our statutory analysis, we have properly focused on whether each and every provision of the agreement is necessary to produce public benefits. For the most part, we concluded that the asserted benefits of common accreditation did not flow from impermissible cooperative behavior that had to be shielded from operation of the antitrust laws but instead resulted because of the mutual competitive advantages enjoyed by air carriers and travel agents operating under these agreements.

IATA specifically takes issue with our treatment of interlining as a public benefit argument rather than as a procompetitive aspect of the conference agency programs.

In our order, we concluded that while interlining did increase competition in the air transportation industry, it occurs because of the existence of interline agreements that are separate and distinct from those at issue in this case. We concluded it would be improper to attribute the competitive benefits of one set of agreements to a second set of agreements. This view is substantiated by the fact that interlining occurs between conference members and nonconference carriers, even though the latter are not members of the conferences. Moreover, carriers accept interline tickets written by commercial travel departments and other persons who are not conference members. 36/ Carriers are also free to use the conference system but not interline. There is, then, no necessary relationship between the increased competition resulting from interline agreements and the conference program. While some parties contend that carrier confidence in the distribution system facilitates interlining, it does not follow that carriers will refuse to interline under other circumstances. In fact, as we discuss more fully below, the weight of evidence in the record supports the opposite conclusion.

EXCLUSIVITY

A. Exclusivity Substantially Reduces Competition.

The exclusivity provisions of the ATC and IATA passenger agency programs require that member carriers shall only retain as agents persons whose names appear on an accredited agents' list. Only locations that have been approved and placed on that list may be used. No commission or sales remuneration (ATC) or sales agency remuneration (IATA) may be paid to any other person.

We found that the practical result of these provisions has been to make travel agents virtually the only marketers of air transportation,

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36/ These arrangements do not violate the exclusivity provisions because the outlets are not compensated for providing marketing services.

other than the air carriers themselves.[37] One of the major reasons for this conclusion was the fact that virtually all carriers participate in the conference programs. Persons who may wish to enter the industry, but do not meet the ATC or IATA standards or who wish to deal with air carriers on different terms cannot approach conference carriers to gain entry into the marketing industry.

IATA challenges this conclusion by arguing that carriers have alternatives to its program. It argues that carriers will only belong to the IATA programs so long as their participation meets their commercial objectives. They will withdraw when it does not, as Pan American World Airways did in the early 1970's. In addition, IATA notes that many U.S. and foreign carriers do not belong to IATA.[38]

The weakness in IATA's argument is that it fails to recognize that the only real alternative to its program is the ATC program, which compliments its own. The provisions of the two conference systems are virtually indentical. With few exceptions, the specific standards of the IATA common accreditation system are duplicated in the ATC program. As a result, there is no effective competition between the IATA and ATC programs. A person

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37/ We defined the relevant market in which competitive effects were to be considered as "passenger air transportation in the U.S." IATA criticizes this definition on the grounds that it ignores cargo and international air transportation and that it is not substantiated in terms of cross-elasticities of supply and demand by service function for carriers and consumers.

We doubt that IATA could seriously dispute our conclusion that their agreements' effect on the price and supply of air transportation services should be our primary focus. Our concern should be with harm to the public, not individual competitors. Such harm is proven by an adverse effect on the price or supply of air transportation services. However, air transportation marketing is a relevant submarket we also considered. Moreover, we looked at passenger air transportation as distinct service functions. From the consumer perspective, cargo and passenger air transportation are not interchangeable. While there is a measure of cross-elasticity of supply, i.e. carriers may switch from providing passenger to providing cargo transportation, they are relatively insignificant and major changes in the character of an airlines' operations seldom occur.

While we could have defined all international air transportation within the relevant market, because of the relationship of marketing to price and supply and consistent with consumer demands, that was not the focus of our decision. Instead, we limited our geographic market definition to travel provided within the U.S. or originating here. As we indicated in our discussion of international comity, our decision reaches only those agreements that affect transportation sold in this country. Perhaps the definition could be better phrased, in view of this consideration, to be "passenger air transportation sold in the U.S."

38/ It lists Northwest, Continental, Delta, Air Florida, Capitol, Republic, World, Metro, Arrow and Singapore Airlines. It does not mention, however, that all but the last four are members of ATC.

wishing to enter the marketing industry does not have the option of choosing the system with the more desirable rules.[39]

From the carrier's perspective, access to the marketing system may be obtained by membership in one or the other conference. This conclusion is borne out by the fact that many ATC carriers have not chosen to join IATA, even though they provide international services. Carriers should not be forced to withdraw from both or either the ATC and IATA programs as a price of marketing innovation. Rather they should be free to pursue alternatives, in addition, if they perceive it to be in their interest.

The other potential disciplinary force on the accredited agent system parties have suggested is non-agent marketers. This line of argument was based upon the view that the IATA agency programs only deal with persons acting in an agency capacity. Competition is allegedly provided by persons acting in "non-agency" capacities who act to prevent abuses in the "agency" distribution system.

We remain convinced that the potential disciplining force of "non-agent" marketers would be neglible while exclusivity is retained. The term agent, as used by the conferences, is an extremely vague concept that has generally been interpreted very broadly. Few entities are likely to enter while "agency" exclusivity is in place.[40] Despite the fact that IATA's rules have been limited to agency relationships for some time, IATA carriers have not exploited the freedom to use non-agent marketers.[41]

39/ Rather, the person will choose the system to which he will apply on the basis of whether he wishes to concentrate his sales efforts on domestic carriers (ATC) or international carriers (IATA). Because the rules are virtually identical, all but about 500 of the approximately 20,000 agents have been accredited by both conferences. Saunders (ATC) 47 Tr. 194. ATC-IR-905 at 152.

40/ Even before the time when IATA suggests it limited its exclusivity provisions to agency relationships, IATA was relying upon the existence of a potential group of non-agent distributors, particularly net fare arrangements, to support its position that its conference program did not raise competitive concerns. See IATA Petition for Partial Reconsideration of Order 79-9-64, at 5-6, October 5, 1979, Docket 36595. Moreover, ATC carriers who are technically subject to the allegedly broader prohibition on non-agent marketers, do in fact use all the same outlets IATA carriers use.

41/ IATA correctly points out that our statement that it has never had a provision comparable to ATC's marketing exclusivity is in error. Nevertheless the underlying proposition for which the statement was cited as support remains sound. The presence of a marketing exclusivity provision has not foreclosed all non-agent marketing systems, nor has its removal induced new types of entry. See fn. 40, supra.

The exclusivity provisions substantially reduce competition because they eliminate rivalry in air carrier distribution systems. [42] They diminish carrier opportunities to employ innovative and potentially more efficient distribution systems. Normal market pressures to innovate are eliminated. The threat that another carrier will improve its marketing system is eliminated. From the agent's perspective, its incentives to innovate and improve efficiency are reduced. Only persons operating under exactly the same rules may sell air transportation. In short, exclusivity eliminates the threat of potential entry into the air transportation marketing industry that is a prerequisite to optimum competitive performance.

B. Reliance on Matters Outside the Record.

IATA also argues that our decision relied on travel agent dominance as our basis for disapproval of the exclusivity provisions. Instead, the essence of our decision on exclusivity was that the normal operation of competitive forces was thwarted by the unnecessarily restrictive provisions of the agreements. Because of the nature of the conference agreements and the participation of virtually all air carriers, the evidence clearly established that the exclusivity provisions have adverse effects on competition between air carriers. We determined that the record did not provide a sufficient basis to conclude that travel agents had collectively exercised the power to foreclose new forms of distribution in the air transportation marketing industry. [43] This does not necessarily detract from our conclusions that the dominance of the relatively homogenous marketing system enforced by the exclusivity rules inhibited air carriers' ability to deal with alternative or innovative marketing outlets.

Rather than confront the substantial legal, economic and factual support for this general conclusion, ASTA, ARTA and IATA suggest that the sole basis for the Board's actions rested on evidence and arguments outside the scope of the hearing record.

They specifically refer to statements made by Chairman McKinnon during the course of the meeting where we instructed the staff on the decision we wished it to prepare in this case. [44] Selective references to a few phrases that were made during the course of a lengthy discussion of the exclusivity issue and its competitive effects do not detract from our decision or our decisionmaking process.

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[42] IATA challenges our citations to the testimony of Malin (USAir) 53 Tr. 53 and Wilson (Ozark) 45 Tr. 102-04 in support of this proposition. We have carefully reviewed their testimony and conclude that we have properly interpreted it.

[43] Order 82-12-52 at 31-32 and 46 n. 158.

[44] ASTA has submitted transcripts of our discussions with staff at meetings held on December 9th and 15th for inclusion in the record in this proceeding. A number of parties rely upon statements made during those meetings and that appear in those transcripts. Our procedural rules generally prohibit reliance upon anything said during the course of a meeting held pursuant to the Government in the Sunshine Act, 5 U.S.C. §552b, in cases before the Board. 14 CFR §310b.9(c). We will address the issues they raise here only because we wish to remove any cloud over our decision.

The Chairman's specific remarks were as follows:

> "I am really disturbed in this case by one particular factor, and that's the travel agents' ability to play a destructive part in the airline system.
>
> In 1978 we deregulated the airlines and allowed the airlines to have at each other in any way possible. And it's gotten really tough and rugged. And they gradually are learning to live under the system.
>
> In order to survive an airline needs the ability to have some type of marketing ability for their product that may be different from the current system.
>
> It's too late for Braniff, and I'm not sure the travel agencies were the full cause of Braniff's demise, of course, but towards the end they played a role.
>
> And it may be too late for some other airlines; it may not be.
>
> But I think the airlines deserve the opportunity to have some kind of alternate ability to market tickets to serve their own selfish interest and survive.
>
> And when you get a whole group of power against you it becomes almost impossible to overcome that." ASTA Motion to File a Petition in Excess of Page Limitations, Appendix A, December 9, 1982, at 42-45.

ASTA, IATA and ARTA view the entirety of the Chairman's remarks to be based upon extra-record information. They cannot be construed in that way, however. The predicate for his reference to the Braniff bankruptcy is a concern about travel agents' ability to influence air carrier decision-making. On this issue there is substantial evidence in the record.

Travel agents sell well over half of most air carriers' tickets. [45/] Any significant reduction or shift in sales on a given airline will be immediately felt. Since there are no marketing alternatives to travel agents, agents hold significant power over carriers as both the economic [46/] and carrier witnesses testified. [47/] Moreover, there are

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45/ Order 82-12-85 at 1.

46/ Guerin-Calvert (DOJ) 84 Tr. 109-111; Eichner (Ticketron) 76 Tr. 58-59 and Banks (NPTA) 80 Tr. 49-50.

47/ Various carrier witnesses testified that they believed travel agents have the ability to divert passengers, that they have done so on occasion and that this fact was considered by various carriers in making marketing decisions. Wilson (Ozark) 45 Tr. 86-88; 123-129; Blake (Eastern) 47 Tr. 7-10; Nesbit (Continental) 48 Tr. 48-49; Palm (Republic) 52 Tr. 135-136; and Malin (USAir) 53 Tr. 28.

numerous examples in the record of instances where agent reaction was an important factor in air carrier decisions concerning their distribution systems, as we found in our order. [48]

The Chairman, then, makes reference to Braniff's bankruptcy as an instance where the presence of marketing alternatives may, have been desirable. It has been widely alleged that Braniff Airways bankruptcy petition was induced by a sudden shift of business away from that carrier. [49] Properly construed, therefore, the Chairman's remarks were only meant to illustrate a distinct failure of the present system -- the lack of competition in air transportation distribution that results from the exclusivity provisions. Numerous other instances that appear in the record could also have been offered. [50]

Nor is it clear that the Chairman's use of Braniff as an example of what may occur because of the absence of marketing alternatives was improper. The positions of ASTA, IATA, and ARTA are premised upon the view that nothing extra-record can be heard. In that way, we are to be treated like a jury. They would require that we hear only one case at a time. This approach is impractical and inconsistent with our role. We do more than adjudicate cases. Our various duties require us to keep informed on general economic conditions and occurrences in the air transportation industry. In the course of carrying out these duties, we are likely to hear statements relevant to the general legal and economic questions at issue in a given case. That possibility does not provide a basis for claiming unfairness. [51]

We closely monitored the Braniff bankruptcy. Information on that carriers' reasons for cessation of its operations and the phenomena of travel agents plating away from carriers in economic distress has been submitted in a number of dockets and other public records. For example, in Docket 40836 we considered amendments to ATC agreements that obligated air carriers participating in the Area Settlement Plan to provide alternate air transportation to passengers holding travel agent issued tickets on an ASP carrier that has gone into default. One of our reasons for approving those amendments was to protect weak air carriers from adverse effects of a loss of travel agent confidence. We concluded that the agreements would reduce agent concern about the financial stability of some carriers, thereby reducing incentives to plate away from carriers and further undermine their financial position. [52] Such references to conclusions reached in other dockets is perfectly acceptable. Indeed, that is the way we build our expertise in the air transportation industry.

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[48] Order 82-12-85 at 46 n. 158. See also pages 45 n. 154 and 73 n. 243.

[49] Only ARTA actually argues that agents did not in fact plate away from Braniff. It makes this argument despite the fact that it relied upon the opposite position in another proceeding. ARTA filing of May 18, 1982 in Docket 40836.

[50] For example, Member Bailey cited United's experience when it attempted to establish a flat commission rate. ASTA's assertion that its filing of a rebuttal exhibit precludes reliance on that experience to show agents' ability to adversely affect carrier revenues, as an NPTA exhibit purported to show, is without foundation. Its rebuttal exhibit merely shows that United's traffic loss was not matched by traffic gains on selected competitors. It does not demonstrate that agents did not "sell away" from United. The data used in that exhibit is far too gross an indicator to pinpoint the sales activity of agents as a group. Moreover, a portion of an article in an agent periodical was read into the record to show that some travel agents have reached the opposite conclusion. Eichner (Ticketron) 76 Tr. 81-82.

[51] Order 79-3-152 at 21, March 22, 1979 and cases cited.

C. Public Benefits

Once it is determined that an agreement may substantially reduce competition, §412 requires that we determine whether an agreement should nevertheless be approved because it meets a serious transportation need or secures important public benefits. As we have already noted, we found that the exclusivity provisions of the passenger agency agreements were not necessary in order to obtain the procompetitive benefits of the common accreditation systems.

ASTA, IATA, ARTA and ATN challenge this conclusion. They argue, as they have throughout this proceeding, that the exclusivity provisions are essential to the preservation of any benefits of the program. They believe that if exclusivity is eliminated, air carriers will, over time, increasingly use non-accredited outlets and the conference system will inevitably fail.

We carefully considered this issue in our opinion and we will not repeat all our findings here. We will, however, make two points. First, we found that the common accreditation systems produced their own incentives to participation, such as a lower cost marketing network, greater numbers of marketing outlets and lower entry costs when entering new markets. Second, these conditions constitute a substantial advantage for conference agents. Persons dealing with airlines outside the conferences must deal with airlines individually or, potentially, through other accreditation systems. Not only will the costs of such transactions be higher to air carriers, but they will be less convenient than the use of commonly accredited agents.

ARTA does raise a novel public benefit argument. It argues that our decision did not fully address how increased competition will adversely affect travel agents. In its view, we have a duty under §412 to consider the reasonableness and fairness of an agreement to those primarily affected by it. ARTA argues that exclusivity is the primary benefit of travel agents derive from participation in the agency programs. With its disapproval they lose that benefit but still must bear the burden of meeting the various standards for accreditation.

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[52] See Order 82-8-118 at 5, August 26, 1982.

We reject ARTA's argument because the primary benefit that agents enjoy by meeting the conference standards is their ability to represent all air carriers after having gone through, at most, two screening procedures. If travel agents regard the standards as unreasonable, they can seek modification of the conference standards. In this regard, our decision to lift antitrust immunity will insure that the accreditation standards are not implemented in a way that places unreasonable burdens on agents. Alternatively, disaffected travel agents could deal with airlines outside the ATC or IATA framework. [53] We do not doubt that some agents may regard exclusivity as a benefit because it limits the kind of marketing competition that they face. But we cannot base our decision on private benefits that are achieved at the expense of consumers who will benefit from increased competition in the air transportation marketing industry.

We must also be concerned that we do not adopt regulatory policies that favor travel agent interests over those of air carriers. Arguments have historically been made that exclusivity is the quid pro quo for permitting carriers to jointly fix commission rates.

Our experiences with deregulation make it clear that entry and pricing are related concepts. Restraints on one must be lifted if restraints on the other are removed. In 1978 and 1980 we disapproved the IATA and ATC agreements which fixed the compensation member carriers could pay their agents. Since that time commission rates have increased dramatically. Constraints on entry into the marketing industry, i.e. the exclusivity provisions, have continued throughout that period. While we did not specifically find that commission payments are excessive, we concluded that the only assurance that commissions are reasonable can come from the operation of the unfettered marketplace. Competitive forces cannot function properly unless the exclusivity provisions are disapproved.

IATA and ARTA once again argue that exclusivity is necessary to insure that consumers will not be injured by incompetent marketers. This argument was also carefully addressed in our opinion. Neither party has cast doubt on our finding that air carriers will shield the public from incompetent marketers because they will bear both the financial costs and the loss of good-will that can result from the appointment of unqualified or dishonest distributors.

IATA also argues that our decision does not give enough weight to foreign government concerns about this case. IATA is especially concerned that our disapproval of exclusivity will lead to a system of captive agents that would be unaccessible or extremely costly to foreign carriers. In its view, common sense suggests that large carriers will have an inherent advantage over small carriers when captive agents come into existence.

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[53] Admittedly, our decision to provide a transitional period may make these alternatives less attractive. However, we contemplated that the conferences will use this time to review the agreements critically with the purpose of insuring standards that were reasonable and narrowly tailored to avoid anticompetitive effects. Moreover, we expect that carriers would be unwilling to retain or set unreasonable standards that might induce travel agents to abandon the airline conferences.

The weakness in the captive agent argument is that it assumes that an agent will derive more revenue if it sells the air transportation of just one or a very few carriers rather than offering a broader inventory. The common accreditation system has been successful because consumers have shown a distinct preference for one stop shopping, as the unprecedented growth of the travel agency industry demonstrates. Passengers want to be able to obtain fare and service information, as well as ticketing and reservations services, on all carriers from a single source. Marketers that limit their sales to the services of a few carriers will be unable to serve the wide variety of traveler demands and thus may be unable to compete effectively with outlets that serve the wide variety of traveler demands by holding multiple appointments. For example, most retailers of consumer goods try to offer a broad range of products to improve their chances of satisfying an individual consumer's demand.

In addition, carriers have little incentive to preclude marketers from selling the air transportation of carriers with whom they do not compete. It may even be preferrable to induce marketers to hold other appointments because the possibilities of interline revenues are increased. Although captive dealerships exist in some areas of retailing, it is implausible to suggest that the airline industry will dramatically alter established distribution channels which greatly increase the scope of an individual carrier's sales. A captive retail outlet may generate slightly more revenue on the sponsoring carrier. But the decline in city ticket offices, which promote one carrier's services, suggests that the costs of producing revenue at such locations is greater than the cost of producing revenue if a carrier relies upon travel agent locations. Although individual travel agent locations may produce somewhat less gross revenues for a given carrier than a city ticket office, which are in effect captive outlets, the conference system offers distinct advantages. By allowing carriers to share the cost of their distribution systems, the travel agent programs facilitate sales through a far greater number of outlets and consequently generate far greater total revenue than could be obtained through a captive distribution system.

If only one carrier served a given city or area, there would be a theoretical incentive for that carrier to establish captive marketing outlets. But with our competitive domestic airline system, this is simply not a realistic scenario.

Moreover, substantial use of non-conference marketers will not occur as long as common agents serve as conscientious representatives of their airline principals and provide competent advice to their clients. Only when the inherent cost advantages of the use of common agents are outweighed by excessive commission charges or more effective marketers develop will non-conference marketers become significant marketing alternatives. While IATA argues that the common accreditation system is both efficient and desirable to airline customers, it seems to undercut these views by claiming that the system is so fragile that it will collapse with the first whiff of competition. As our decision discusses at great length, reliance on competition is the preferred policy tool to insure that airline ticket distribution is efficient and satisfies consumer demands.

Finally, IATA fails to recognize that its members will benefit if more efficient marketing alternatives are devised. They will be able to take advantage of innovative marketing techniques other carriers devise and will have the freedom to innovate on their own. Our decision, then, does not place undue burdens on foreign carriers or give U.S. carriers any advantage.

D. Our Distinction between On-line and Interline Exclusivity.

Our decision did not reject all the public benefit arguments raised by the various proponents of exclusivity. We found that there was a limited relationship between the exclusivity provisions and the interline agreements into which carriers have entered with one another. However, we rejected arguments that exclusivity was a prerequisite to carriers' willingness to interline with one another.

Interline agreements generally permit anyone in one air carrier's marketing system to write air transportation on other air carriers that are parties to the agreement. When one carrier's agents write interline tickets on another carrier or carriers, the first carrier protects its interline partners from financial loss. The only injury that interline partners may suffer at the hands of the distributors they have not appointed, because of the interline agreements, is the ill-will that could result from misticketing or other passenger inconveniences that may occur when a marketer is insufficiently familiar with the service he is selling. Because existing interline agreements were entered into with the exclusivity provisions in place, carriers have not had an opportunity to consider the possibility that their interline partners may compensate persons other than accredited agents to market air transportation.

We concluded, however, that this possibility did not warrant indefinite retention of the exclusivity provisions. Interlining carriers can easily protect this limited interest in their interline agreements. To afford air carriers the opportunity to consider making such changes to their agreements, we decided to continue to approve the exclusivity provisions to the extent that they precluded conference members from using and compensating non-conference agents or other persons for writing interline transportation, absent a contrary agreement with its interline partners, for a two-year period. [54] Exclusivity, to the extent it precluded conference members from compensating persons other than accredited agents for selling air transportation entirely on their own services was immediately disapproved. [55]

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[54] Non conference marketers, such as business travel departments, are given individual carrier stock and write interline transportation at the present time. They merely cannot be compensated for their services. In addition, commuter carriers and their marketers are free to write interline transportation on ATC and IATA carriers.

The proponents argue that our on-line/interline distinction is not workable. IATA, for example, maintains that its interline agreements require carriers to accept interline tickets written by another carrier (or its distributors). As a result, our exclusivity decision allowing carriers the right to use non-accredited agents infringes upon the coequal right to refuse to accept documents from non-accredited agents.

IATA misunderstands our decision. Our exclusivity distinction addressed this very interest. Until December 31, 1984, one air carrier must preclude its non-conference agents or other marketers from writing air transportation on another carrier unless the second carrier has agreed to the use of such non-conference outlet. IATA's insistence that the second carrier will be obligated to accept documents prepared by the first's non-conference outlets, even though it has not given its permission, requires an unlikely sequence of events. The first air carrier will have to be willing to willfully violate conference resolutions, for which infractions the conference may impose penalties. It also assumes that the non-conference outlet will misrepresent itself to the public, selling air transportation it is unauthorized to sell and generate the ill-will that is likely to result. Finally, it assumes that non-conference distributors will write tickets and make reservations for transportation for which they will not be compensated. The carrier that does not choose to use non-accredited agents is, of course, free to accept tickets written by non-accredited distributors, but can refuse to pay commissions upon its portion. [56]

55/ During our discussion of interline agreements at the Sunshine Meeting of December 9, the staff acknowledged that it has no knowledge of the contents of specific interline agreements. Proponents of the agreements have suggested that the staff admission amounts to a confession of ignorance as to the workings of the interline system. They assert that we should delay any action in this case until we have educated ourselves on the interline system. Those parties misinterpret the staff's comments. Our staff deals with the workings of the interline system on a day-to-day basis and is fully congnizant of their essential features. Staff was merely indicating that not all agreements are on file and that it did not presume to be able to say with certainty the extent to which they preclude the use of non-conference marketers. That is the only concern that may be related to this proceeding. Moreover, its concern was that a decision limiting the use, as opposed to compensation, of non-accredited outlets to write interline air transportation would force some persons, particularly BTDs, to lose that privilege.

56/ After the two-year period, or even earlier if carriers modify their interline agreements to address the issue, the rights of acceptance or rejection of non-conference distributor written tickets will be governed by the terms of interline agreements.

ASTA argues our distinction is unworkable because nothing in our order prevents a non-conference marketer from holding himself out as an accredited travel agent. Such distributors are, as a result, free to misrepresent the scope of their authority to the public. Neither the distributor nor the appointing carrier has any incentive to indicate its limited authority.

ASTA's approach is too simplistic. It ignores the fact that accredited travel agents have the means and the incentive to distinguish themselves from other marketers in their advertisements and promotions. Only they can claim accreditation by the conferences and the right to fully represent its membership. If others make such claims, they will be subject to legal actions based on, inter alia, fraud, misrepresentation or violations of the terms of their contract with appointing carriers. Finally, the argument also assumes that the public will not be able to distinguish between accredited and non-accredited outlets, a proposition refuted by the substantial weight of the evidence in this record.

ASTA and IATA also suggest that it was improper for us to distinguish between on-line and interline exclusivity because the distinction was not litigated before the Board. They correctly point out that such a distinction was not raised during the course of the hearing, nor in any of the briefs that were submitted in this case.

What these parties fail to recognize is that we created the distinction in an effort to accommodate their concerns about adverse effects on interlining if we disapproved exclusivity altogether. The issue of the relationship of exclusivity to interlining was argued and briefed at length in this proceeding. Our distinction is based upon the limited character of carriers' interest when another carrier writes its transportation. They now argue that we should not have attempted to fashion a remedy to accommodate that interest. Perhaps their hope is that, confronted with an all or nothing choice, we will approve the exclusivity provisions. We would not. Our finding is that interlining carriers have a very limited interest in knowing who another carrier's marketers are. That interest should be addressed in their interline agreements with other interline partners. Our transition is only meant to afford carriers an opportunity to react to protect their legitimate interests in the interline transaction. [57]

ASTA also asserts that while our decision claims to have approved interline exclusivity, it has actually disapproved it. ASTA reaches this conclusion because our order permits carriers to agree to allow on-line agents to write interline transportation between them.

57/ An air carrier can have no legitimate interest in a competing carrier's decision to authorize on-line sales. Air carriers do not now enjoy antitrust immunity to agree or tacitly collude, either with other carriers or agents, to restrain another carrier's use of unaccredited marketers to sell its own tickets.

ASTA misstates the extent of our approval and misinterprets our intentions in creating the on-line/interline distinction. We approved the exclusivity provisions to the extent that they prohibited interline sales as a precautionary measure that enables carriers to reflect upon and perhaps adjust their procedures when they interline with carriers using non-accredited marketers. Our approval was only until carriers have an opportunity to review their interline agreements in this area, but not beyond December 31, 1984. When an air carrier has made an affirmative decision to accept tickets written by another carrier's non-conference agents, there is no longer any basis for prohibiting that entity from writing an interline ticket. Our distinction was not intended to preserve interline sales for accredited travel agents, as ASTA erroneously assumes. 58/

E. Deferral.

Order 82-12-85 became effective on the date it was served, December 29, 1982. Shortly thereafter, a number of parties sought deferral of its effective date and additional time to file petitions for reconsideration of our decision. They argued that deferral and additional time for petitions were necessary in order for interested persons to formulate their views and and for the conferences to change their resolutions to conform to our decision.

By Order 83-1-57, January 17, 1983, the requests for deferral of our order's effective date were denied. We found deferral to be unnecessary because the order, by its terms, was entirely permissive and did not mandate any changes in the ways that air carriers market their services. We did, however, double the time allotted for parties to file petitions for reconsideration, extending it from January 18th to February 8th. 59/

In their petitions for reconsideration, ASTA, ATC and IATA argue that it was unfair to deny their requests for more time to file petitions for reconsideration and to refuse to defer our order's effective date. Their primary basis for making this claim is that they needed time to conform the conference agreements to our distinction.

There was nothing unfair or prejudicial in the procedures we employed. We merely followed our ordinary practice of approving agree-

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58/ Indeed, we would expect that given carriers' economic incentives to interline, airlines will probably not elect to forego revenues unless it was convinced that the non-conference marketer were clearly unsuited. Our discussion in this order and Order 82-12-82 presumes that carriers in their negotiations on interline agreements will be concerned only with protecting their legitimate business interests. We certainly do not intend to imply that airlines are free to use interline agreements as a vehicle to coerce or restrain the competitive options of their interline partners.

59/ By Order 83-1-97, January 26, 1983 we denied subsequent requests for deferral of the order's effective date and still more time for filing petitions for reconsideration.

ments, with a stated interpretation on how it would be implemented, or with distinct disapprovals applying only to particular sections. Our order carefully delineated the scope of our approvals. To the extent exclusivity was approved, it remains in effect. While interested persons may need to refer to our opinion to learn the limitations of our approval, this is not a unique occurrence. For example, IATA's rules regarding the placement of an agency location on customer premises could, for almost three years, only be understood by reference to one of our orders. [60] No additional action is required by either ATC or IATA to implement our distinction. The submission of a revised resolution, reflecting our decision, is entirely a matter within ATC's and IATA's discretion.

More important, our preference is that the next two years be used by air carriers to modify their interline agreements to address the possible use of non-conference agents. We did not contemplate that it would be a time for the conferences to reach industrywide conclusions on the rules under which non-accredited agents may operate. While some joint decisions may be useful, conference action should not unnecessarily infringe upon individual carrier prerogatives. In short, we reject the underlying notion that the conferences need time to figure out how to regulate on-line agents.

There is no merit to the assertion that our decisions to merely double the time for petitions for reconsideration and not to defer our order's effective date somehow denied parties their due process rights. We have provided parties with all the rights attendant to an adjudicatory proceeding. An extensive record was developed and a decision issued that is supported by the weight of evidence in that record. In all respects our actions were in accordance with the Administrative Procedural Act and our procedural rules. [61] After nearly three and a half years, we have every reason to reject attempts to further delay this proceeding.

The last point to be made is that our decision does not require carriers to otherwise modify their marketing systems. In fact, we found that significant changes are not likely to occur soon, given the benefits of using conference agents. It is likely, therefore, that we could have immediately disapproved exclusivity, in its entirety, without adverse effects. It is only out of an abundance of caution that we allotted time for a transition before removal of the exclusivity provisions.

60/ *See* Ruggiero (IATA) 57 Tr. 15-21 and Order 80-7-112 at 6, July 17, 1980.

61/ Our procedural rules provide for 20 days for filing petitions for reconsideration. We afforded parties 41. Those rules also provide that petitions for reconsideration do not stay the effectiveness of our decision. 14 CFR §302.37.

F. Our Distinction Is Not Necessary.

Our distinction between on-line and interline sales is also criticized by NPTA as being unnecessary. [62] In its view, interline exclusivity should be disapproved immediately because interline agreements already exist between the airlines and it would be a simple matter for carriers to modify these agreements.

As we have already indicated, our action is designed to facilitate a transition. While we tend to agree with NPTA that the modifications, if any, to individual interline agreements should be a relatively simple task, we prefer to give carriers ample time to undertake that task. Moreover, NPTA seems to believe that we desire to promote compensation of BTD's to redress a competitive imbalance. However, we do not necessarily regard this outcome as necessary or, for that matter, desirable such that we should skew our decision to promote a particular private interest. Rather, we seek only to permit greater competitive freedom. We are not trying to predict or influence carrier business judgments by forcing precipitous changes.

G. Dual Status.

In its petition, American Express requests that we clarify whether our action on exclusivity permits persons holding accredited agency status to also reach special agreements with individual air carriers so they may act in an "on-line only" agent capacity. It believes that was our intention, citing our desire to increase the potential for innovation and efficiency improvements in the air transportation industry and our statements that travel agents would be in the forefront of innovations likely to take place. American Express acknowledges, however, that some safeguards may be required. DOJ and BDA have indicated their support of the American Express request.

IATA, ATC and ATN oppose American Express' request. These parties all argue that our order contemplated that potential entry into the marketing industry would come from persons other than conference agents. They cite passages of our order that appear to support this conclusion. If we permit agents to hold dual statuses, it will, in their view, allow agents, particularly large agents, to bargain down the selection criteria for conference accredited agents.

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[62] ASTA points out that NPTA's petition for reconsideration exceeds the page limitations of our rules. Unlike ASTA, which also filed a petition which is excessive, NPTA has not sought permission to file a longer petition. IATA asks that the entire petition be stricken because it raises matters that occurred after the issuance of our order. Specifically, it includes letters sent to NPTA members by various air carriers indicating their unwillingness to enter into on-line agent relationships at the present time. If the petition is not stricken, IATA demands the right to cross-examine the preparers of the letters. We will waive our page limitations, as we have done previously to accommodate other parties, including ASTA and IATA. However, NPTA is on notice that we do not ascribe any weight to its post-decision evidence.

We clearly contemplated that owners of conference agencies should have the freedom to take advantage of the opportunity to deal directly with air carriers. Existing marketers are obviously in the best position to find opportunities to innovate in the marketing industry. If such persons cannot take advantage of new ideas they develop and opportunities are foreclosed to them, one of the major forces for increased efficiency in air transportation marketing will be curtailed, if not eliminated. In fact, one of our reasons for disapproving exclusivity was the fact that it created a commonality of interest among agents and chilled their incentives to innovate.

The benefits of the common accreditation system will not be threatened by the possibility of persons holding dual statuses. Rather, it will, as IATA and ATC suggest, put pressure on the conferences to place no greater a restraint on competition than is necessary to attain its benefits. In this regard, it should be remembered that we indicated that the conference standards may be more rigorous than is necessary to accomplish their objectives. Agents will only want to enter into arrangements outside the conferences when they believe existing standards are unduly restrictive. We regard the potential for operations under the different standards as a welcome competitive spur to encourage the conferences not to adopt overly broad or unnecessary standards on persons wishing to become common agents. Market forces, then, will assume the role we have traditionally performed, by insuring that carriers do not use their collective economic power to place unreasonable burdens on their agents.

We encountered much the same argument in the IATA Commissions proceeding. There it was argued that only larger agents would be able to negotiate higher commissions, while smaller agents would not, and that the smaller agents would therefore be unable to compete. We noted that this was unlikely to occur because the industry is not highly capital intensive, there seemed to be significant competition as between agents, and the number of agents was continuing to grow at a strong rate. [63]

We have no reason to believe that American Express' size will give it a bargaining advantage that it may translate into the power to become one of only a few competitors in the air transportation marketing industry or the power to force other agents out of business. American Express currently owns some 125 outlets out of the more than 20,000 agency locations. [64] While this position probably gives it far more bargaining power, in its dealings with air carriers than most other agents, that does not mean American Express will be able to obtain advantages that other agents will not be able to secure.

63/ Order 78-8-87 at 17-18, October 11, 1978.

64/ Daly (American Express) 66 Tr. 11. In addition, some 350 travel agent locations are American Express representatives. These agencies are independently owned, but have entered into contractual arrangements with American Express to provide travel services under its name. 66 Tr. 12.

What has occurred since fixed commission agreements were disapproved was that all agents both large and small have benefited from generally rising commission rates. Other agents may benefit from any ability American Express has to negotiate revised conference standards. Of course, other agents are free to enter into cooperative working arrangements in an effort to duplicate any advantage American Express may have.

Even if we were to assume that our decision would give some advantage to American Express along these lines, it is unlikely that the public would be harmed. No one has suggested how consumers might be adversely affected. On the contrary, if there are economies in the agent industry, changes reflecting those economies could produce efficiencies benefiting the industry and the public.

IATA, ATC and ATN are also concerned that the possibility of agents holding dual status will practically eliminate agents' ability to protect their interests in the concepts of "accredited travel agent" and "approved travel agency," and that public confusion will occur. In addition, if a single owner receives standard ticket stock for its approved locations and interline restricted documents for its unapproved agency locations, it will use only the standard stock. In their view, carriers will be unable to prevent such abuses.

There is some merit to these concerns. However, such concerns do not warrant a prohibition on dual status agents. Some limitations on a single location operating under dual status would appear to adequately address them. If a single location could be denominated both a conference and a non-conference agency, without any distinctions, it may be difficult to distinguish between transactions handled there. In addition, there may be a possibility of public confusion if the same or similar trade names are used in both accredited and non-accredited operations. The conferences should carefully consider whether this will occur before adopting restrictions in this area. It would appear to be reasonable, therefore, for the conferences to craft rules to maintain the distinction for their authorized locations and trade names. 65/

A set of reasonable rules will also go a long way toward eliminating the potential problems of public confusion, and protecting interlining carriers' interests in knowing who is writing their air transportation. In any event, the conference can invoke their sanctions for unauthorized use of travel documents. In addition, the burden may be placed upon their member carriers to insure that agents do not misuse their dual status.

However, we want to caution ATC and IATA that the Conferences have a very limited interest in the non-conference activities of agencies holding dual statuses. They could not, for example, establish location standards for non-conference locations. Their interest only extends to insuring that conference activities are conducted in accordance with their accreditation and retention standards. Of course, some standards may be imposed as a condition to providing access to the Area Settlement Plan.

65/ In some cases, participants in a joint venture, particularly one that has market power, must have the freedom to simultaneously deal outside the joint venture. However, the joint ventures are generally entitled to enforce uniform standards upon activities conducted within their frameworks. See Order 82-12-85 at 54, n.185.

There is no reason to defer action on American Express' request, as ASTA asks. As we have noted, the possibility of agents holding dual statuses was contemplated in our decision. Moreover, we believe it would place an unreasonable burden on agents to deny them the freedoms we have given other persons to operate outside the conference systems.

OTHER REQUESTS FOR MODIFICATION OF PASSENGER AGREEMENTS

NPTA opposes our decision to continue to approve the provisions that prohibit business travel departments (BTDs) and other large purchasers of air transportation from becoming conference agents. [66] We found that these provisions may tend to lessen competition and may tend to lessen the benefits of the common accreditation systems. We concluded, however, that persons who do not wish to become accredited agents would do so if these provisions were immediately disapproved. We decided, therefore, to approve the provisions for a two-year period. In the interim, other regulatory changes we have already taken would probably begin to be felt in the industry and the possibility of distortions to the agency systems would be eliminated.

NPTA argues that these provisions should be disapproved immediately. It indicates that, based on past experience, increased competition will not occur unless we mandate change.

NPTA has raised no arguments we have not already considered. Its requests are aimed at forcing air carriers to compensate BTD's for the tickets they write. This is fundamentally an economic decision between individual corporation purchasers and air carriers. Our decision provides them with an immediate mechanism to pursue their interests. Moreover, even after December 31, 1984, air carriers will still be free to deny any approved agent its appointment.

IATA challenges our decision to require it to allow its agents to reimburse customers when they share employees or the customer otherwise performs services for or bears costs normally borne by the agents. [67] We will affirm our decision.

IATA argues that we must first specify in detail what customer provided services and/or facilities may be used as a cost basis for commission offsets. We need not consider every conceivable possibility at this time. We have already concluded that cost sharing is permissible for certain activities, i.e., shared employees, rent for space used and utilities. Those were the areas in which we will require IATA to permit cost reimbursement. We will address others should they arise.

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[66] The most important of these are the rule that prevent any person that does more than 20% of its business with itself from becoming a common agent and the rule that prohibits the payment of commissions on tickets an accredited agent writes for his own use, except in unusual circumstances.

[67] Order 82-12-85 at 90.

IATA also argues that we must first consult with foreign governments to assure that cost reimbursements are permissible under the rate articles of various bilateral agreements. There is no basis for this assertion. We have elsewhere approved a number of cost reimbursement mechanisms in international air transportation. 68/ Our reasoning for disapproval was that compensation for commercial services rendered to an agent by the customer do not necessarily constitute rebates. We do not believe that foreign governments must be involved in a question of legal interpretation of our statutes.

CARGO AGREEMENTS

IATA criticizes our decision to disapprove the cargo agency exclusivity provisions. IATA notes that we found that there is a wider variety of ways carriers have goods prepared for shipment and through which they sell their cargo services and that we concluded that these alternatives provide an effective disciplining force on IATA accredited cargo agents. Nevertheless, we disapproved the provision because it may deny some conference members the use of alternate marketers, just like the exclusivity provisions of the passenger agency program. It asserts our finding was based on conclusions about exclusivity in another market.

IATA's argument overstates a crucial finding and misinterprets our comparison of the passenger and cargo programs. We found that the cargo exclusivity provisions had been less effective in restraining competition, not that they did not restrain competition. 69/ Our reference to the passenger programs was to point out the adverse economic consequences of an agreement denying competitive alternatives and the legal basis for disapproval of such an agreement. We then found that the same adverse effects that required disapproval of passenger agency exclusivity -- the inhibition of potential entry of new forms of distribution -- were at work with the cargo agency exclusivity provisions. 70/

IAAA asks that we clarify the extent to which agents are to be liable under Resolution 833 for misquoting rates or other actions. IAAA interprets the Initial Decision to recommend that proof that a cargo agent took reasonable steps to obtain rate information should be a defense to allegations of a violation of that resolution. IAAA argues that to require that agents make "every effort," as our decision does, places too great a burden on agents.

We agree. To require "every effort" is tantamount to imposing absolute liability on the agent. It suggests that the agent must exhaust every conceivable means of obtaining fare information. Only reasonable effort should be required of the agent. The opinion and order should be modified to reflect this change.

68/ See e.g., 14 CFR §399.864 and §223.2(k).
69/ Order 82-12-85 at 115.
70/ Id.

IAAA also asks that we clarify the meaning of the phase "commercial dispute" as it is used in referring to provisions of the resolutions covering the settlement of disputes or adjustments of accounts as between an agent and an airline. IAAA asks us to adopt a broad definition of the term, so that it will encompass disputes between carriers and agents relating to the current report and sales period, as well as prior reports and periods. IATA's witness apparently limited his definition of the term so that it would apply only to the current report and sales period. [71] IATA has apparently agreed to IAAA's definition. [72] We will, therefore, grant IAAA's request.

ANTITRUST IMMUNITY

A. Mandatory Immunity.

As we indicated above, IATA and ASTA believe that antitrust immunity must be conferred upon the agreements we have approved. Their view is based upon their interpretation of how §412 must be applied: *i.e.*, antitrust concerns trigger a balancing of the agreements' benefits, of any kind, against the identifiable alternatives to achieving those benefits. [73] Whenever the balancing analysis has been "triggered" we will, therefore, be analyzing an agreement under subsection 412(a)(2)(A)(i). Section 414 provides that whenever an agreement is approved under that subsection, we must exempt any person affected by the agreement from the operation of the antitrust laws.

We have already offered a number of reasons why IATA's interpretation of §412 must be rejected. Some additional observations are necessary, however. If we interpreted §412 as IATA suggests and did not attempt to focus on competitive effects in our initial analysis, we could not reach a reasonable conclusion as to whether an agreement before us may substantially reduce competition. In turn, we would not be able to assess whether antitrust immunity would be necessary in order for the agreement to go forward. Procompetitive agreements that would be permitted under the antitrust laws would have to be granted antitrust immunity in virtually every case.

Moreover, IATA's approach creates perverse incentives. To insure that an agreement raises antitrust concerns, and receives antitrust immunity, it will be formulated to restrain competition in some way.

B. Discretionary Immunity

A number of parties argue that we should, in any event, grant antitrust immunity on the grounds that it is required by the public interest. IATA and ATN, for example, argue that it is required because without it the programs will not continue. In their view, carriers will abandon the programs as soon as immunity is withdrawn because of the fear of antitrust lawsuits against the programs and their members.

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[71] See Lindsay (IATA) 89 Tr. 53, 54.
[72] Bailey (IATA) 2 O.A. Tr. 235-236.
[73] IATA Petition at 8.

Throughout this proceeding, there has been a shared perception that most aspects of the programs are on balance procompetitive, so that there will be no substantive basis for antitrust challenge. The fear, however, is that antitrust lawyers will bring frivolous lawsuits against the program. IATA cites the fact that NPTA has indicated it would have sued the conferences had we not granted them antitrust immunity for a two year period. In IATA's view, this indicates how wrong we were in minimizing the threat of frivolous lawsuits.

The problem with IATA's argument is that the provisions NPTA says it would have challenged as being anticompetitive [74] we found may be anticompetitive. They were approved, for a limited time, to meet transportation needs. In such circumstances, antitrust immunity is mandatory. NPTA has not threatened suit on the basic programs which we found may be procompetitive. Similarly, DOJ has indicated that it would not challenge a common accreditation program that was cleansed of features to which it objected, the most notable of these being the exclusivity provisions.

There is no basis for the argument that antitrust immunity is necessary for the agreements to continue. Air carriers will not be willing to abandon the benefits of the common accreditation programs and the ASP because of the cost of defending themselves against frivolous lawsuits. They will, however, have an incentive to make sure that the standards themselves and carrier discussions in the context of their joint efforts do not deviate into unlawful conduct. We regard the threat of lawsuits as a positive feature of our decision. Antitrust lawsuits are a normal facet of doing business in an unregulated environment. While frivolous lawsuits impose some costs, Congress has made a judgment, and we agree, that our society is better served by a system that is concerned primarily with dealing with occasional lapses in competitive behavior than in pervasive regulation and review. The possibility of some misguided lawsuits against the programs does not justify the exercise of our extraordinary power to confer antitrust immunity upon these agreements for an indefinite period.

IATA's principal argument is that our decision to withdraw antitrust immunity is unacceptable to foreign governments. There is a measure of bullying in IATA's pleading. It speculates that if immunity is withdrawn foreign governments will consider the need to retaliate against U.S. carrier marketing operations in their countries. They do not argue, however, that our decision will have extraterritorial effects, or will result in preferential treatment for U.S. carriers. [75] Rather, IATA demands that we substitute its judgment for our own. We fully appreciate the fact that many foreign governments do not favor the application of antitrust laws. But to concur with IATA's argument would permit foreign governments to apply their laws and policies extraterritorially in the U.S. As we have indicated elsewhere, IATA's contention that the U.S. cannot apply its own antitrust legislation to sales within the U.S. territory of air transportation is both unreasonable and unacceptable. [76] We reassert that conclusion here.

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[74] NPTA seeks to challenge "the same anticompetitive elements the Board has noted": i.e., the 20% rule and the common control rule. NPTA Petition at 19-20.

IATA argues that conferral of immunity is necessary to assure foreign governments that the U.S. is committed to providing equal access to agency locations now assured by these programs.

The initial point to be made is that we have approved the common accreditation programs. In that sense we are fully committed to the programs. The removal of antitrust immunity only means that the programs must operate in accordance with U.S. antitrust laws and are subject to court rather than CAB review. These are not unusual obligations for foreign enterprises. Foreign producers in virtually every other industry engage in marketing competition within the U.S. without protection from U.S. antitrust laws.

Further, IATA's statement that our decision casts doubt on our commitment to equal access to the agency programs confuses different concepts. Fair and equal access, as the term is used in bilateral agreements, refers to opportunity for foreign carriers to attract potential passenger traffic in the U.S. market. It does not define the ways in which carriers, having been given access to a market, must market their services. In this regard, the conference agreements were developed because individual carriers believed them to be in their economic interest. They could be abandoned tomorrow, and we could not prevent it. We are, of course, convinced that international carriers will continue to have access to a system of common agents even though the scheme of market regulation may not be as familiar as Board intervention. Finally, the Board is fully committed to complying with international obligations incurred by the United States. In the event that any foreign carrier is denied fair and equal access to the U.S. market, we have ample authority to fashion an appropriate remedy.

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[75] IATA's arguments are all the more ironic in light of problems of preferential access to marketing systems that U.S. flag carriers have encountered in some foreign countries. See ATC-IR-118.

[76] ER-1246 at 11, September 22, 1981, 46 FR 46787 and Order 81-11-58 at 5, November 10, 1981. See also Sumitomo Shoji America, Inc. v. Avagliano, ___ U.S. ___, 102 S.Ct. 2374, 2381 (1982), where the Court found that the purpose of a treaty was not to give foreign companies greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.

C. Three Year Immunity

IATA, ATC, ARTA and ASTA ask us to grant antitrust immunity to the conference programs for a three year period in order to allow the Board's successor to re-examine the issue of whether indefinite antitrust immunity should be granted the programs. They argue that if immunity is not extended for an additional year there will be a period during which the agreements will be without antitrust immunity while they seek indefinite immunity. [77]

As DOJ points out, this line of argument is based upon the parties' own refusal to accept our decision. Our decision was not to preserve antitrust immunity, but to eliminate it. Rather than accept this, they ask that we pass on the final decision to DOJ or other successor to our §414 powers. In reality, of course, we are not merely stewards of section 412 for DOJ.

More important, acceding to their requests would undercut the Board's objective to achieve a transition to a less-regulated regime. Our purpose, then, for granting immunity to the programs in the first place -- to afford carriers an opportunity to make additional modifications they believe are desirable -- would be frustrated. Consequently, we will deny the various requests that antitrust immunity be granted for a three-year period.

D. Transitional Immunity is not Necessary

NPTA also challenges our disposition of the immunity issue. It argues that the Airline Deregulation Act mandates that we place maximum reliance on competition, which in this case means that antitrust immunity must be withdrawn immediately. In its view, we lack the power to grant antitrust immunity for a transitional period.

This view is unsupportable. Section 414, by its terms, allows us to tailor our grant of immunity. Specifically, we have the discretion to grant antitrust immunity only as necessary to allow the transaction to proceed. This statutory language gives us the necessary regulatory flexibility to limit both the scope and duration of the immunity granted to the particular circumstances in a given case.

NPTA also repeats the argument that carriers will not act competitively unless we force them to do so, in this circumstance by withdrawing antitrust immunity. Its arguments, however, are based entirely upon whether or not BTD's receive compensation for providing ticketing and

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77/ There is an implicit assumption in the argument that future filings will not stay the effect of our decision. That view is correct. Absent further order, the effectiveness of Order 82-12-85 will not be stayed by the filing of any document in which persons request that antitrust immunity be continued beyond December 31, 1984 or that approvals that expire on that day be extended.

reservations services. NPTA fails to recognize our often repeated conclusion that the decision on whether or not to compensate BTD's is basically an economic one that must be left to individual air carrier prerogatives.

SUNSHINE ACT ALLEGATIONS

ASTA and IATA also challenge our decision on the grounds that it was made in violation of the Government in the Sunshine Act. [78] That Act provides that deliberations that determine or result in the joint conduct or disposition of official agency business shall be open to public observation unless an exemption applies.

ASTA maintains that information disclosed at our sunshine meeting of December 9 and under the Freedom of Information Act reveals that our decision in this case was actually reached prior to December 9. It asserts that the major issues in this case were decided in a series of meetings between one or two Board members and our advisory staff. The open meeting of December 9 was held only to "rubber stamp" decisions that had already been made. In its view, were this not the case, staff could not have sent us a nearly complete 140 page opinion written in a matter of a few days. [79]

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[78] 5 U.S.C. §552b.

ASTA's arguments are founded upon documents, released to the public, that indicate that at least nineteen meetings were held, between late August 1982 and December 9, between one or two Board members and advisory staff dealing with this proceeding. ASTA recognizes that in order for a meeting to be covered by the Sunshine Act, a gathering must include "at least the number of individual agency members required to take action on behalf of the agency." [80] None of the 19 meetings involved a quorum of the Board members. Thus, the meetings were permitted by the Act's terms. ASTA nevertheless, argues that the spirit of the Act is violated if a series of meetings takes place at which the substantive issues are decided.

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[79] ASTA also asserts that our Office of the General Counsel was attacking the position of supporters of the agency agreements weeks before the I.D. in this case was issued. It cites a portion of the "For Information" memorandum of May 12, 1982 (See footnote 4, supra) that suggests that one of the parties' legal arguments should not be allowed to divert us from our purposes in instituting this case. The staff document gave as an example the argument that we cannot examine portions of an agreement or condition our approval. Our powers to review individual provisions or to grant approval subject to condition have been settled for 35 years and been approved by the courts. Staff merely indicated that there was no legal merit to the arguments. This opinion was offered at the end of a document that faithfully summarized the parties' arguments. So the issue is not whether this was the only information before the us; the gravaman of ASTA's complaint is that our staff in its role as our legal counsel offered an opinion on the quality of the legal arguments presented in this case. The administrative decisionmaking process would be greatly hindered if staff were barred from offering its assessment of the issues, particularly on legal questions.

ASTA also seems to suggest there was some staff impropriety in monitoring this proceeding and submitting memoranda prior to the release of the judge's recommendations. We have found, however, that this process, especially in complex cases -- this one involved approximately 40,000 pages of testimony, exhibits and information responses -- facilitates the decisionmaking process. Review of the contents of the record and parties' arguments while a proceeding is still before the administrative law judge eliminates a frequent cause of delay in the administrative process. There is nothing prejudicial to parties' interests in simultaneously educating ourselves with the record in a hearing case.

[80] 4 U.S.C. §5526(a)(2)(1976).

As ASTA recognizes, we are entitled to consult with our staff prior to holding public meetings. [81] Nothing in the Sunshine Act requires that our consultations with staff be open to the public. Informal meetings are held to educate and inform us of the issues raised in particular proceeding. In addition, such meetings allow us to individually engage in a frank and candid discussion with staff. We can freely discuss alternate ways of deciding a given issue and obtain staff input on its likely consequences. In fact, a number of different proposals were suggested at these meetings. Had these discussions with staff been open to the public, significant public confusion would have resulted because ideas and tentative proposals, offered for staff consideration, would be interpreted by persons observing the meetings as our final position. Oftentimes, staff assessment of our ideas, particularly the likely impact on the industry, required additional research, staff level discussions, and subsequent meetings for further discussion and refinement.

The Sunshine Act protects this process. The Senate Report on the Sunshine Act provided that "[i]t is not the intent of the bill to prevent any two agency members, regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views." [82] This is also reflected in the language of the Act itself. The Sunshine Act defines a "meeting" as "the deliberations" of a quorum of members "where such deliberations determine or result in the joint conduct or disposition of official agency business." Discussions which are intended to clarify issues are not "deliberations" within the normal meaning of the term [83] and do not result in the conduct or disposition of agency business. [84] Of course, where less than a quorum of agency members is present, and there has been no delegation of responsibility for such lesser number of persons to act on the agency's behalf, there could be no conduct or disposition of agency business at the meeting even if deliberations occurred.

81/ ASTA Petition at 8. See Braniff Airways v. CAB, 379 F.2d 453, 461 (D.C. Cir. 1967); Montrose Chemical Co. v. Train, 491 F.2d 63 (D.C. Cir. 1974); Graham v. NTSB, 530 F.2d 317 (8th Cir. 1978) and Texas International-National Acquisition Case, Order 79-3-152 at 20, March 3, 1979.

82/ S. Rep. No. 354, 94th Cong., 1st Sess. at 19 (1975). Because the passage refers to informal discussions between two members of a three-member agency, the passage exempts this type of discussion even among a quorum of members. ITT World Communications Inc. v. FCC, No. 80-0428 at 46 n.163 (D.C. Cir. Decided February 1, 1983).

83/ To deliberate means to consider reasons for and against a thing in order to make up one's mind. Webster's New World Dictionary, College Edition 1968.

84/ It is well established that Congress intended to permit agency members to act on agency business that is circulated to them "sequentially in writing." Communications Systems, Inc v. FCC, 595 F.2d 797, 800 (D.C. Cir. 1978). See also Order 82-11-109 at 9, November 22, 1982.

ASTA apparently believes that the number of meetings held in this case suggests a deliberate effort to evade the requirements of the Sunshine Act. There is no truth to its suggestion. As ASTA must acknowledge, this is one of the most complex and difficult cases ever to come before us. The proceedings were in progress for nearly three and a half years. Almost 40,000 pages of testimony, exhibits and information responses have been submitted for the record. 85/ The Initial Decision in this case was 213 pages in length, without appendices. The number of meetings only reflects the scope of the issues presented.

Moreover, ASTA does not recognize that ten of the nineteen staff meetings occurred on or before September 15 and 16, when oral argument was held in this case. Those meetings were held to prepare us for the task of questioning attorneys who have been deeply immersed in the issues of this case since its inception. Because of the extensive effort that staff undertook to prepare us for oral argument, a lively and lengthy argument lasting two full business days was held.

The meetings between staff and individual members held between the oral argument and December 1, 1982, were not held for the purpose or with the result of avoiding the requirements of the Sunshine Act. The meetings were held in order to consult with staff on the issues. If we were to adopt the logic of ASTA's position, we would be barred from discussing any issue with staff outside of a sunshine act meeting. It therefore borders on the absurd to suggest that we cannot individually consider the issues, especially in a proceeding of this magnitude, until it appears on the calendar of an open meeting. 86/ We have complied with both the letter and spirit of the Sunshine Act because the deliberative process -- the process of formulating a consensus by exchanging views -- occurred in a public forum.

There is no basis for the contention that we made up our minds in the series of meetings with the staff and that the open meetings were just a replay, for public consumption, of decisions that had already been made. The transcripts of the meetings held on December 9 and 16 reveal a lively discussion on all the important issues. Moreover, the entire meetings were taken up with the process of formulating our consensus on how to dispose of

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85/ The number of issues presented in this case is demonstrated by the fact that our staff prepared six memoranda, totaling seventy single spaced pages, setting out the various issues raised and arguments by the parties. Subsequent memos, providing information on the Initial Decision, subsequent briefs and staff analysis, totaled 113 pages.

86/ In this case, more than 35 hours of discussions were held with staff in the 19 meetings alone, in addition to the almost five hours of Sunshine Meetings that were held.

those issues.[87] Our efforts to formulate a consensus are apparent with any objective reading of the transcript.[88] The fragility of our consensus is aptly demonstrated by the fact that the final disposition of major substantive issues remained unresolved on December 16 when we were considering the draft opinion submitted by staff. All issues were finally resolved after a lengthy recess to allow staff to make substantial revisions to the draft's disposition of important issues. The diversity of opinion on the issues in this case is also demonstrated by the fact that four members submitted separate statements indicating their disagreement with various portions of the collective final decision.

ASTA also draws the inference that we decided the issues in this case prior to the meeting of December 9 from the fact that our staff was able to produce a nearly complete 140 page draft opinion in a matter of a few days. While ASTA acknowledges that there would be nothing improper in beginning to prepare an opinion before deliberations occur, it insists that only non-substantive portions may be begun.[89]

As we have indicated, however, the deliberative process did not begin until December 9. Staff began circulating portions of its drafts for our review the following day. We were not reviewing their work product prior to that time. There is no suggestion, therefore, that any portion of our opinion was adopted, even informally, prior to December 9. Rather, ASTA's argument is that staff must have had a good idea how the issues would be resolved because such a long draft was done so quickly.

There is nothing unusual or improper in staff beginning preparation of draft opinions and orders prior to our addressing those issues in a sunshine meeting. Most items that appear on the calendars of Board meetings are prepared by staff on the basis of their own assessment of the likely outcome of our deliberations. All documents prepared before December 9 were, in the same way, the consequence of staff initiative. But this practice does not obligate us to adopt staff recommendations. We frequently alter substantial portions of such draft documents submitted to us. In fact, that is what occurred in this case. Material portions of the staff draft were altered prior to the adoption of a decision.

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[87] Admittedly, there is no recital of the facts of the case, or other background discussion. However, as noted above, we do not interpret the Sunshine Act to require that individual members can consider issues only in an open meeting.

[88] Our response to ASTA's FOIA request also suggests the absence of a consensus, prior to the meeting of December 9, by the fact that there was a continuous stream of meetings and memoranda to the Board until that date.

[89] On March 22, 1983 ASTA filed a Motion for Leave to File a Supplement to its Answer to Petitions for Reconsideration. Attached to its motion are two staff drafts of the final order in this proceeding. They are submitted to support its argument that a virtually complete order was prepared prior to December 9, 1982. We will grant ASTA's motion. Of course, its submission merely represents argument, not evidence.

The Board desired to decide the case before the end of the year, as was discussed at the meetings.[90] Our staff cannot be faulted for making every effort to complete the decision within that period.[91]

Finally, the remedy ASTA suggests is unsupported by case law, even if it were correct on Sunshine violations. In ASTA's view, we must vacate our decision. Moreover, it maintains that since these alleged procedural errors cannot be remedied by subsequent proceedings, we should adopt the decision of the administrative law judge.

Sunshine Act violations do not provide an automatic basis for a reversal of an agency's substantive decision.[92] The usual remedy for Sunshine Act violations is the release of transcripts of the meetings that were held. Since no transcripts of the meetings held with staff were made, other relief, such as additional procedures, might be warranted. A finding that the Sunshine Act was violated would not, however, be a basis for adopting recommendations we have found to be unsound and injurious to the public.

ACCORDINGLY:

1. We grant the Petitions for Reconsideration of the Air Traffic Conference of America, American Express Company, the American Society of Travel Agents, Associated Travel Nationwide, the Association of Retail Travel Agents, the International Air Transport Association, the International Airforwarder and Agents Association and the National Passenger Traffic Association;

2. We deny the various requests that we modify Order 81-12-85 of ATC, ASTA, ATN, ARTA, IATA and NPTA;

3. We grant the requests of American Express and IAAA that we clarify Order 82-12-85 to the extent set out above;

4. We grant the motions of ASTA and IATA to expand the page limitations of our procedural rules in petitions for reconsideration;

5. We grant, *sua sponte*, waiver of page limits for NPTA's petition;

90/ See Transcripts of Sunshine Meetings attached to ASTA Motion to Exceed Page Limitations, Transcript of December 9 meeting at 115-17 and Transcript of December 16 meeting at 74-75.

91/ We should point out that there was some consideration given to placing the proceeding on the calendar items to be considered at the sunshine meetings of November 4, 1982 and November 18, 1982. However, Member Gloria Schaffer was unable to attend the former and Member James Smith to attend the later. Therefore, consideration of the issues was postponed to the next scheduled meeting.

92/ *Pan American World Airways v. CAB*, 684 F.2d 31, 36 (D.C. Cir. 1982).

6. We grant ASTA's Motion for Leave to File a Supplement to its Answer to Petitions for Reconsideration; and

7. Except to the extent granted, all other petitions, applications, motions and other requests are denied.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred except Member Schaffer who concurred in part and dissented in part. Member Bailey filed the attached concurring statement. Member Schaffer filed the attached concurring in part and dissenting in part statement.

BAILEY, MEMBER, CONCURRING:

While we have given the conferences the flexibility to consider further restrictions on dual status locations and use of tradenames, I cannot agree with broad prohibitions on travel agents' businesses. Consistent with the thrust of our entire approach in this case, I contemplate that any agreement would be scrutinized to ensure that restrictions in these areas were reasonably related to the purposes of the conference program and no more restrictive than necessary to achieve legitimate conference goals.

While the Board's earlier order clearly envisioned that the conferences could develop and protect a distinguishing trademark or symbol for conference agents, we have not had an opportunity to consider whether the use of a corporate trademark should be regulated by the conferences. It seems to me that if dual status agents are allowed to display a conference trademark only at an accredited location, consumers will not be misled if they choose to deal with an unaccredited location bearing a corporate tradename in which they have confidence. While the Board is open to argument on this issue, I think that the conferences should devote their energies to developing a distinctive trademark for accredited locations rather than attempting to regulate the use of corporate tradenames or logos.

/S/ ELIZABETH E. BAILEY

SCHAFFER, MEMBER, CONCURRING IN PART, DISSENTING IN PART:

In my statement accompanying Order 82-12-85, I explained why I was opposed to the modifications which the majority imposed on the ATC and IATA conference systems. In light of the petitions for reconsideration of that decision, I remain convinced that the record in the Marketing Case does not support the majority's decision, and I favor restoration of the agency exclusivity and BTD provisions, as well as the antitrust immunity which the agreements have historically enjoyed.

I regret that the Board, in its failure to undertake a comprehensive reconsideration of its decision in the Marketing Case, has lost its last opportunity to insure that the system by which air transportation is marketed remains efficient and responsive to both carriers and consumers.

Although I disagree with much of the majority's decision in this case, I fully concur that the procedures by which it was reached were both fair and in conformance with our rules. The Board's action was based strictly on the record compiled in this complex case and no decisions were made prior to the public meetings. I believe that this decision fully exemplifies the integrity of the Board's decision-making process.

With regard to the issue of "dual-status" agents which was raised by American Express, I believe that the conferences should be permitted to adopt rules which would prohibit accredited agents from performing non-accredited services at the same location. I also believe that the conferences should have the ability to restrict the use of the same or similar trade names in both components of a dual-agency operation.

I believe that in both of these areas there exists great potential for public confusion. The ability of the consumer to make an informed and intelligent choice between the services of accredited and non-accredited agents directly depends on the ability of the consumer to know who he is dealing with at any given time. Dual-operations in the same location or with similar trade names would, in my opinion, render the consumer's freedom of choice virtually meaningless.

/S/GLORIA SCHAFFER

Mr. McKinnon. In my oral presentation today I want to make a few quick points about the background of the travel agency business, and the competitive marketing case, and then I, along with some of our staff here appearing with me, would certainly welcome your questions.

It is particularly appropriate that this subcommittee has asked to hear about the Board's competitive marketing case because it is about subjects that concern you. The decision is primarily concerned with removing restraints on trade, and it affects many small businesses, the travel agents. The Board's decision is often seen as the beginning of a dramatic change.

Well, if dramatic changes happen, they will be in response to the demands of the marketplace. The Board did not force change. It simply removed obstacles to it.

If the present travel agency system is exactly what the airlines and the travelers want, that is what they will get. There will be no major changes. But if there is room for alternatives, they will eventually arise. The alternatives may operate only on the margins, meeting needs that are now neglected, or they may compete directly with the accredited travel agency programs.

The essential point is the decision allows competition, and competition is the lifeblood of the free enterprise system. Also, the decision benefits travel agents, small or large, that are willing to compete in ways that the previous system prohibited. The airlines will also benefit. They now can tailor the marketing of their product to their needs, rather than being forced to sell tickets only through their own offices or through the agencies that all other competitors have agreed to use.

Maybe most importantly, the passengers will benefit because they will have a greater variety of services and prices. Travel agents arose when the airlines got together long ago and decided how airline seats should be sold, if they are sold by someone other than the airline itself. The airlines also collectively decided who would sell airline seats, and to whom and at what price. This collective system is one way to insure agency competence and honesty, and the Board approved it.

But it is not the only way, and for that reason, the Board recently freed air carriers to set up other methods. About 60 percent of domestic seats, and about 80 percent of international seats, are sold by travel agents. In short, the airlines depend heavily on travel agent sales.

A joint system of marketing has many benefits. It will not be anticompetitive if properly structured, and if it is subject to the same rules of competition, the antitrust laws that apply to most other industries.

What made the airline agreements on marketing possible was the Civil Aeronautics Board. In the late 1940's, the Board immunized such agreements from the antitrust laws.

The power to grant antitrust immunity was part of airline regulation. More recently, the Board has tried to reduce the anticompetitive aspects of the airline travel agent agreements. For example, in 1979, we disapproved that part of the agreements that allowed the airlines to set uniform commission rates. In other words, fix the prices they paid their agents. Our action helped the agents.

Commissions have risen by 42 percent, from 7 percent to an average of 10 percent today.

Over the years, the Board made many decision that gave travel agents a greater change to compete against the airlines, and the agents made the most of it.

Corporate travel now is the fastest growing part of the travel agent's business. Indeed, it now represents about 54 percent of agency books compared to about 43 percent just a few years ago.

Certain Board decisions made that possible. In 1978, the Congress passed a law, the Airline Deregulation Act, that told the CAB in no uncertain terms to place reliance on competition and market forces to the greatest extent reasonably possible.

The Board agrees that the marketplace is a far better force for competition than Civil Aeronautics Board regulation. So the Board reviewed the entire field of ticket sales. It began the competitive marketing investigation of the travel agent industry. The Board's job was to examine the benefits and other effects of the agency programs and square them with the strongly procompetitive principles of the Federal Aviation Act.

The Board's decision is a compromise that takes into account the basic principles of the free enterprise system. But it is also sensitive to the benefits of the established systems of travel agencies, and it provides for a period of adjustment.

There are five main areas that the Board focused upon in looking at the passenger agency programs: Common accreditation; business travel departments; exclusivity; the area settlement plan; and antitrust immunity.

Probably the most important part of our decision was the Board's approval, virtually intact, of two things: Common accreditation and the area settlement plan.

By common accreditation, I mean the rules that establish minimum levels of competency, honesty, and financial depth, as well as standards for how travel agents do business, such as handling of remittances, ticket stock, security, and so forth.

What that means is that the marketing decision made by the Civil Aeronautics Board will not require travel agents to change the way they do business from day to day.

The three other major findings of the Board were: The airlines should not be limited to only one way to sell their product; they ought to have other marketing options.

Two, that the general rules of competition, the antitrust laws, should govern airline sales, rather than detailed Government regulation by the CAB or its successor.

Three, that the Board recognized that this was a major change from the long-established system that would require a period of adjustment, so it provided for a generous 2-year period for transition. This permits time for fine-tuning the agreements to meet antitrust concerns.

In the meantime, the Board allowed a limited form of agency competition, the so-called online agents. The bars in the agreements that made it hard for business travel departments, BTD's, to become accredited agents were retained.

We also said that we would reexamine the issue of antitrust immunity before the 2 years were up if it is demonstrated that there are materially changed circumstances or if there is an important need for continuation of immunity.

Why did we make these decisions? Basically because the Board's orientation is toward competition, not regulation.

Let me give you my personal perspective for a moment. After looking at all the facts, the thing that sticks out in my mind is this: If a person is good at what he does, he doesn't have to fear competition. If it is going to prosper, he is going to prosper under the free enterprise system.

Thoughtful observers of the Board's decision are beginning to catch on to a few important points. The Board's decision is permissive; change will occur only if an airline, acting individually, decides it can compete better. The airlines can still select who they want to have sell their tickets and they are not so foolish as to put their valuable ticket stock into the hands of just anybody. Alternative outlets will most likely offer a limited product line rather than duplicate the full-service travel agents.

Most airlines opposed deregulation, but they appreciate that the Board and Congress gave them the freedom to compete. They almost universally favor deregulation today even though times have been tough for the airlines. Indeed, many feel that they could not survive the recession without the freedom that deregulation has given them.

Now many travel agents are not excited about what the Board did in the competitive marketing case, not because they will be harmed, but because they can't tell exactly what the new competition will look like. I believe that there are a lot of travel agents out there, small and large, that have good ideas worth pursuing in a truly free market.

They are being told that the agency system will collapse unless they accept regulation imposed by the airlines and the Government, but that is simply not true. The fact is that the airlines can design conference programs that comply with the antitrust laws.

The Board's order suggested some changes that would bring the current system more in line with the Federal antitrust laws. Let's look at some of the arguments against opening the distribution of airline tickets to new competitors.

First is the claim that the travel agent competence and honesty will suffer. But airlines have absolutely no interest in turning their retail operations over to people who are incompetent or dishonest. Take a look from the airline's perspective.

The airline must provide the transportation, or a refund. It must financially back up each of its tickets that is written for transportation over another airline. The airline bears the inventory risk. The airline wants to satisfy its customers. The ticket stock is like a blank check on the airline's account, so security and trustworthiness will always be a high priority.

A second claim is that interlining will be hurt because of the CAB decision, but airlines interline because they usually make more money that way, by attracting additional traffic. Airlines have every reason to continuing interlining.

Besides, interlining is controlled by different agreements and there is evidence that airlines now accept interline tickets written by nonconference agents or ticketers: GSA's and BTD's, for example.

The central question is to what extent the Board should agree to approve and immunize airline agreements to gain the benefits of a cooperative agency system. The answer is that an exclusive license for travel agents is not needed for the efficient distribution of airline services. It does not increase productivity, or lower costs.

The economic incentives for the airlines to want to stay with the travel agent program is provided by the area settlement plan and certain basic common accreditation standards. It is an efficient, cost-saving way to establish a widespread, competent, and secure distribution system, but not necessarily the only way that could be devised.

You have asked if the airlines will abandon the conference system because of the threat of unjustified, frivolous lawsuits. The Board found that highly unlikely, in view of the substantial benefits of the conference programs and the area settlement plan.

Although I cannot deny that frivolous lawsuits can happen, the proper remedy is not to pass out immunity to a few favored industries. Protection from the antitrust laws is extraordinary relief, not available to most businesses. Exposure to antitrust risk is part of the basic structure of competition. The grant of immunity reflects a decision that competition will not work.

Also, immunity has a cost. It costs airlines and other interested parties a lot of time and money. It requires that the Government take a close look at agreements, since there is no private remedy. That creates costs for the Government, and ultimately the taxpayer. So the real issue is not the cost of legal fees. It is really a question of whether Congress desires regulation of air carriers.

It only seemed fair to me, as we turned each airline loose to survive or fail based on its management talents, that they certainly needed to have control over all of their operations, including the sale and marketing of their own tickets. Some travel agent operations have opposed the idea of permitting competition in the sale of air transportation. That is understandable, but not supportable. If you talk to individual agents, you would find that many distrust the airline's ability to combine their economic power. Many agents feel that there are unreasonable limitations on the way travel agents do business. They are looking for ways to do business better.

In this regard, the Board's decision will help many travel agents because they can now bring their entrepreneurial skills to bear for the first time without having to convince all airlines and all other travel agents to change the system. But rather than focus on the opportunities presented by competition, some agents fear the loss of business if other marketing alternatives are permitted. This fear is greatly exaggerated.

One of the agents' own witnesses at the CAB testimony testified that at most, travel agents would lose only 2 percent of their sales if their exclusion privilege is lost. Since travel agency growth has been averaging around 10 percent a year over the past decade, good times or bad, the agency sales have increased as a part of the total, and since ticket prices have also increased, the actual net effect is most likely to be positive. In short, agents will share in a bigger slice of a bigger pie.

If corporate clients now get services that are of real economic value to them, they will not want to set up an in-house agency operation. Why? Because it would take a large volume of business to justify this expense. But today you have a situation where a corporate travel department that is run as an in-plant agency under the auspices of a travel agent can get paid for the agent's use of the corporate offices and personnel. Because of the agency agreements, a BTD can't get compensation similar to the in-plant, even though the BTD is virtually indistinguishable in function from an in-plant location.

Effective 2 years from now, these industry rules that effectively force BTD's to use travel agent middlemen in order to get compensated like in-plants will be disapproved. The most likely impact of that decision will be on large volume agencies that specialize in setting up in-plants.

However, these agencies are well prepared to compete for corporate travel business, so I don't think you will see any adverse effects.

Small agencies are unlikely to be affected to any great extent. Their corporate clients are mostly small- or medium-sized corporations that would not find it profitable to set up either an in-house agency or an in-plant. Their volume would not justify it.

A lot of people misinterpret the Board's decision on BTD's. It doesn't say that BTD's can automatically get travel agent commissions, either now or after the 2-year transitional period. Applying the competitive principles of the antitrust laws, the Board said that airlines could not agree to boycott BTD's. Airlines are free to decide individually not to compensate a BTD, or an airline may decide not to pay a full commission. All the Board said was that it was wrong to have the airlines acting together to decide on what to do. It is convenient to think of this in terms of bargaining power. BTD's aren't allowed to agree under the antitrust laws to deal only with an airline that gives favorable terms.

Why is it fair for the airlines to get together to cut out corporations from getting compensated for the ticket writing services they provide to the airlines?

It must be recognized that BTD's now provide much the same services as a travel agency. Right now there are less than 600 BTD's. They don't use travel agents. So if these outfits were to get some compensation for ticketing, it would not be at the expense of any agents. Also, there is no legal or economic reason to deny BTD's compensation for their services, whether in terms of a commission or otherwise.

The big change is not going to come from a decline in the number of agencies. Change is going to come in the variety and quality of services and in price competition. Under our decision, airline passengers are going to benefit from a wider array of services at lower prices. When it comes to selecting between the economic good of the many and the narrow interests of the few, we as Americans have generally rejected the idea of special treatment.

Mr. Chairman, if you have any questions, we would be happy to attempt to answer them for you.

Mr. LUKEN. We thank you very much for your attendance and clear exposition of your position, including the rationale behind the decision.

If there is no objection, I will begin with a few questions and comments. In bringing about this decision and taking this action there were basically no complaints filed with the CAB; is that right?

Mr. MCKINNON. That is basically correct, sir, but what we dealt with was the law, and the law said for us to look at the airline system in a competitive manner, and that is what was our primary motivation.

Mr. LUKEN. Your statement and your decision leans heavily on philosophy. You seem to justify it on the basis of your anxiety to deregulate. Those who take a different view might also wonder about the old axiom of "if it ain't broke, don't fix it." If you don't have a lot of complaints, if the system seems to be working as far as all the participants are concerned, it seems unusual and perhaps unwise to initiate a change, particularly a radical one; wouldn't you say?

Mr. MCKINNON. Mr. Chairman, that is a very good thought, except something did happen back in 1978 when the system changed from a regulated environment, the way the airlines operated, to a deregulated environment, which said, in essence, that airlines were in charge of their own destiny and future. As a result of that, they no longer have the Government telling them what to do and how to do it, so they had to make decisions on their own survival.

The thing that personally convinced me on this decision as it relates to exclusivity was if an airline has to compete, win or lose or survive on their own talents and skills and ability, they are producing the product, they ought to have the freedom to determine how that product is sold instead of having just one group of people determine how that product is sold. There should be the freedom for them to select an alternative way of selling their product.

Mr. LUKEN. Doesn't it depend upon which group of people do the regulating? If we leave them to the tender mercies of the antitrust laws, the regulators become the Justice Department, the courts and who files the suits, as you pointed out in your testimony, and I believe in the decision. We are really talking about regulation either way if the airlines are subject to the antitrust laws. You describe it as a more general rule of competition, following the general rules of competition as enforced by the courts, the antitrust laws and the Justice Department.

There is enforcement there, obviously. The Justice Department has taken positions on some of these matters, saying that they are not going to be completely free. It is not the law of the jungle; is it?

Mr. MCKINNON. You mean the airlines are not completely free? They are free to compete under the normal rules of competition. Now, if they violate antitrust laws, they have got a problem.

Mr. LUKEN. I think the problem is under the rules that you have set forth. One question is whether those rules are consistent with what the Congress has had in mind with the various pieces of legislation.

Let me get to a couple of points. Carriers are free to use their own employees to sell tickets in different ways, aren't they, at different locations?

Mr. McKINNON. Yes, sir. I might comment on that, Mr. Chairman. The fact is, though, it is a very expensive system if they depended totally on their own employees to sell all their tickets the way most airlines are structured today.

Now, there are a few, like People Express, that pretty much do most of their own selling.

Mr. LUKEN. Let's see what problems you found. Are there significant barriers to entry for firms who wish to become accredited agencies?

Mr. McKINNON. No, sir, if you want to play the game the way a travel agent plays the game, that is the only way to play the game at the present time. What we did was allow somebody with new and creative and innovative ideas to come along, and we really don't know of any of those, but we created an opportunity for somebody that had a creative idea to come in and have the opportunity to compete.

Mr. LUKEN. If it weren't for the agency system, would market entry be easier or more difficult for new carriers? In other words, the obvious point is that this system is going to be materially changed by this decision, because it will make it easier for a new airline carrier to enter the business.

They already pick up a system of distribution of their tickets, which is obviously a tremendous advantage for a new carrier. But if we enter into a system where the individual airlines develop their own systems, the one airline system of distribution and so on, it will be much more difficult for a new carrier to break into an area where it can compete.

Mr. McKINNON. That is true, sir.

Mr. LUKEN. Competition is what I am interested in.

Mr. McKINNON. I guess there are a lot of philosophies on it, but basically, I agree with you. If that is the needed system, nothing is going to happen to it.

All we did was open the opportunity for somebody that has a better idea to come along and have that idea be used. We didn't say we are doing away with the current system.

As long as it is being used, and as long as it provides a service, there is no reason or incentive to change, but if somebody comes up with a better idea, why shouldn't they have that opportunity to implement that idea.

Mr. LUKEN. Well, let me put it this way. On page 19 of the Board's decision on reconsideration, the Board argues that there is little likelihood of the development of captive agents who will limit their sales to one carrier schedule.

I don't think that I am taking this out of context in pointing it out.

It seems that if this doesn't occur your decision will have little effect. If it does occur, as many people believe it will, it will destroy the system which has been built.

Mr. McKINNON. Mr. Chairman, it is our belief, after reviewing the facts on this, that the system is not going to dramatically change because there is a need for travel agents, and there is a need for the services they provide. It is exemplified by the very fact that their sales have dramatically increased. As a matter fact, in Travel Weekly of this week they point out that agency sales through the area settlement plan rose 20 percent in April, the biggest monthly increase since August 1982.

April sales reached nearly $2.2 billion; the first time sales topped the $2 billion mark during the month with 4 reporting weeks. Despite a 9-percent increase in the number of agencies, the bottom line on the average weekly sales report in April rose 15 percent to 25,556, the first such percentage increase this year.

The dollar volume of commissions increased 17 percent to $2.02 million. I mean, what I am sharing with you is that today, even in April, 4 or 5 months since our decision was made, travel agents show the greatest gain and greatest opportunity for profit in their history. So there is still a need for what the agencies are doing.

Mr. LUKEN. You are not suggesting that your order has gone into effect fully, are you?

Mr. McKINNON. Parts of it are in effect; yes, sir.

Mr. LUKEN. But not the significant parts.

Mr. McKINNON. Nobody has come along with a new idea on how to come up with a better system yet. All we did was allow them that opportunity.

Mr. LUKEN. What you are doing is combining a number of factors. First of all, the travel agency business has been in the ascendancy for a long time, so it continues to prosper. There is some improvement of the economy, and therefore more traffic, right? I assume there is.

Mr. McKINNON. I think, sir, what really happened, was deregulation.

Mr. LUKEN. Your decision really hasn't really had an impact yet. It will not have full impact for a couple of years.

We certainly aren't going to take the first few months as evidence or an indication of what is going to happen, are we?

Mr. McKINNON. No, sir. People are making studies now to figure out——

Mr. LUKEN. How much mischief will occur?

Mr. McKINNON. Well, the other side of the coin, Mr. Chairman, is that deregulation has been the biggest boon to travel agents anybody has ever thought of for two reasons. This case came along, and part of this case was the opportunity to allow agents flexible commissions.

It was, for some reason, before I ever got on the Board separated from the decision. We allowed the agents to have the benefits of flexibility in the commissions from the airlines, so they moved from 7 to 10 percent. That is one thing that has increased their sales. A second thing is it is more complicated to book a ticket now than it was under a regulated environment, which means people have had incentives to go to travel agents to handle the details for them. So as long as that incentive is there, their sales have increased, and it has been a big boon to the travel agency industry.

Mr. LUKEN. Well, I know that my time has just about elapsed, but let me summarize a little bit. It is my understanding that Mr. Gabriel Phillips, vice president of ATA, says that changes in the market system since 1978 have made the system very competitive.

I think we probably all agree on that. Right?

Mr. McKINNON. Yes, sir.

Mr. LUKEN. But that the CAB decision adds little additional competitive opportunity. That is a problem, I think, that many of us see. But lots of potential for harm. For example, special airline/agency relationships outside of the ATC, and one airline agent's cost of defending antitrust agreements.

That is the big one. We haven't gone into it very much. We don't have much time. But that is the spector.

All of these lovely things that you have described about the health of this industry can come toppling down pretty quickly if we get a rash of suits or one particular successful suit, which attacks any particular facet of this system.

Mr. McKINNON. Mr. Chairman, I would just like to share with you that when you analyze this decision—you hit the nail on the head. Antitrust is something that many people overlook. That is the key to the whole decision.

When the Board made that decision, they voted three to two on the antitrust immunity. At that time they told the agents industry, they said, as I have mentioned in my testimony, "If you can show us reasons to reverse this, come on back and show it to us, and we will give it serious consideration. We will really look at it."

Since that time, for your information, two members on the Board of those three that voted to eliminate antitrust immunity have now left the CAB, and you have two new members. One is onboard and one will be onboard one of these days. So I am sure that they will look at this with an open eye, too, and evaluate whether antitrust immunity should be included or deleted.

Mr. LUKEN. The minority are the ones who have left?

Mr. McKINNON. No. The majority is gone.

Mr. LUKEN. I hope everybody is not bailing out.

Mr. McKINNON. The majority is gone and the minority that voted to retain antitrust immunity is still there. So you have two new ones coming on with an open mind.

But even the majority told those people to come back, and if you can demonstrate, show us irreparable harm or damage, we will reconsider it. So the ball is sort of in the travel agency court to come back to present it to the CAB between now and 1984.

Mr. LUKEN. Just listen, maybe you will be convinced.

The gentleman from Minnesota.

Mr. WEBER. Thank you, Mr. Chairman.

Mr. McKinnon, I just want to begin with the point that the chairman touched on that sort of goes to the structure of your presentation. As the chairman mentioned, you rely fairly heavily on the philosophy of free enterprise and competition, but isn't antitrust legislation itself an intrusion into the marketplace?

Mr. McKINNON. Yes, sir. A unique thing in this particular instance.

Mr. WEBER. So as the chairman pointed out, really, you are not necessarily talking about anything that is more or less consistent with a free market approach to this industry, you are just talking about altering the structure of the Federal Government's regulation?

Mr. **McKinnon**. In essence, Congressman, we are talking about eliminating the Federal Government's involvement in the structure.

Mr. **Weber**. You still have the antitrust laws, though.

Mr. **McKinnon**. The laws exist, but that applies to everybody. Here we have singled out an industry that we are protecting.

Mr. **Weber**. Since we are talking theoretically for a minute, if you are really talking about an unfettered, free market, you wouldn't have any antitrust laws, either, would you?

Mr. **McKinnon**. Well, I think that you would. That is not really the issue of where we are at today, I don't believe.

Mr. **Weber**. Well, it may not be the exact issue we are at today, and yet it bears on it because so much of your testimony seems to talk philosophically about free enterprise and free markets, and I certainly generally agree with you there.

I want to carry that philosophical argument to its conclusion because it seems to me that it is the impact of the antitrust legislation that is of concern to many people that are out there in the marketplace today.

The point I am making is that I don't think it is fair just to look at parts of the market in isolation and say there is too much Federal intrusion here, but then to look at other Federal intrusions into the marketplace, antitrust legislation, and say, well, that is all right, that is somehow more consistent with free market principles.

Mr. **McKinnon**. But I believe what you should have is the antitrust law set up to allow everybody to compete equally and fairly in the competitive arena. What this case particularly says is, you have made the travel agents exclusive and different, and we have been giving you special protection, so you don't have to compete in the arena with everybody else.

The antitrust laws, as a whole, have allowed everybody else to have sort of fair and equal terms to compete on, but we have said, travel agents, you are a special group, we are going to give you extra privileges that the whole competitive community is not entitled to.

Mr. **Weber**. If we carry that through a little bit, though, the economists also argue about monopoly, that monopoly exists when there is not access to the marketplace, in other words, when there are barriers set up by the monopolistic industry that prevent entrance into the marketplace. Do you find or argue that there are barriers to entrants into the travel agency business that justify this?

Mr. **McKinnon**. Yes, sir, there is no barriers to compete in the same identical way that any other travel agency competes, but if somebody comes along with a new idea, there is a barrier that prohibits them from coming up and implementing their new idea. As long as you compete the way any travel agent competes, you use the same parameters, operate the same, identical way, then there is no problem. But what if you develop a new idea?

What if everybody said the original light bulb was the only way you could light a room? Then all of a sudden somebody came up with a neon way of lighting a room. You say, well, you can't do that because that is not the same way of lighting the room.

Mr. **Weber**. I am not sure that is quite my point.

Mr. McKinnon. I am trying to show that new ideas come along and new ideas develop and there shouldn't be a barrier to those.

Mr. Weber. What are those barriers that you see?

Mr. McKinnon. Well, there is a system, a way the travel agent works. They have certain accreditation requirements. They have certain procedures they operate on. The whole system, the way they function is one way, and nobody can come up with any other different alternatives.

Mr. Weber. But it does not really restrict people from entrance into the profession or the business in a meaningful way?

Mr. McKinnon. Yes, sir, it does, from selling tickets on an airline, they are prohibited, unless they sell it the identical way that the travel agent rules are set up to sell tickets.

As long as you sell tickets that way, you are OK. But if you want to try some new, innovative idea like Ticketron which was mentioned in this case, if you tried them that way, you couldn't do it.

Mr. Weber. Going on a little bit further, since we are talking about the travel agent community, generally speaking, as you project out there, what kind of a system is going to be set up under the new regime?

How do you believe it will impact on the travel agent community? You touched on that in your testimony. I would like you to be a little more explicit in that.

Mr. McKinnon. Congressman, we don't really feel it is going to have a big impact on the travel agents. Their own testimony was that at most this could affect them by 2 percent. With the growth of the industry, that looks like that will only be a little less growth than what they have had. We think if you are good at what you do, you really don't have any problems. You are going to be successful. If you are not good at what you do, should the Government protect you?

Mr. Weber. You still argue in your testimony that some joint systems of marketing will be set up under the new regime. Is that correct?

Mr. McKinnon. That is a possibility.

Mr. Weber. Could you explain to me a little more how exactly you think that could happen?

Mr. McKinnon. Congressman, to be quite up front with you, we looked at this from the idea people having the options and ideas, to be able to implement new ideas and creative ideas. We didn't decide we were going to step out and say this group of people are going to be allowed to come in and compete in this way or that group the other way.

All we did was look at it, are there barriers to entry, can people have an opportunity to come in and compete. We decided that that was the right thing to be done under the laws that were designed to carry out airline deregulation, and also the IATCA rules that were passed.

That is what we looked at. We didn't try to say we are going to provide favoritism for this one idea or favoritism for that idea. We just wanted it to be open for anybody to come in with creative ideas to be a part of business.

Mr. Weber. My time is running down. I have one more question, though, because I am going to ask it of a later witness, and I wanted to get your response first. How is the elimination of the antitrust immunity going to affect the international marketing system? I understand that the Department of State made a recommendation on this issue to CAB. I wonder if you could explain State's concern and your response to that concern and how you think that whole area will be affected.

Mr. McKINNON. Well, there is obviously some concern by some foreign airlines in this case. Of course, I submit to you some of the foreign airlines have different ways of discounting their tickets in their own countries.

They have certain biases built into their computer systems. We don't think it is going to have an international damaging effect.

Mr. WEBER. Is that what the State Department argued?

Mr. McKINNON. Evidently, what the State Department said, they want to maintain a system of common accreditation. The Board approved common accreditation, so that everybody is commonly accredited the same.

Mr. WEBER. Would that violate antitrust laws?

Mr. McKINNON. No, sir.

Mr. WEBER. Basically, though, your decision did not accept the concern of the State Department, do I understand that correctly?

Mr. McKINNON. We gave it careful consideration.

Mr. WEBER. I understand that response. We use it in our mail all the time. [Laughter.] I have no further questions, Mr. Chairman.

Mr. LUKEN. Thank you, Congressman. We welcome the gentleman from Indiana, Mr. McCloskey.

Mr. McCLOSKEY. Thank you, Mr. Chairman.

Mr. McKinnon, two or three questions. I am fairly new in this area, so I am not exactly laden with expertise, but generally speaking from what you say, would you basically contend that deregulation is always beneficial in our free enterprise, capitalistic economy, ultimately for the consumer, which are the people we care about.

Mr. McKINNON. Yes, Congressman McCloskey, I would say it is. It is not perfect, but it is a lot more perfect than a regulated environment.

Mr. McCLOSKEY. It is not why we are here today, but I just represent a lot of cities and towns, you know, that used to have airlines and buslines that are becoming severely hampered by this free enterprise deregulation. I guess what I am curious about, basically, is what type of competitors are the travel agents getting under your innovations?

Mr. McKINNON. So far they really have received no competition under it, no new ideas have sprung up that have created any problems, or any competition for them up to this point.

Mr. McCLOSKEY. I guess I am not talking about the ideas. I am talking about the actual firms or businesses or enterprises; surely someone must be doing it.

Mr. McKINNON. There are people looking at it. Ticketron is taking a look at one way of doing online type things. I don't think that they have made any real progress up to this point.

But if you will recall for a moment, in 1978, in 1977, there were a lot of ideas that are in place today that didn't exist. One is Federal Express, and that type of thing, limited to very small aircraft. Also

Peoples Express hadn't come along yet with their innovative ideas. There are a lot of ideas that have grown that have served the public and the people have been delighted to make use of those types of services.

Mr. McCLOSKEY. But wouldn't you say, take their policies or their capabilities of innovation out of it, the more likely set of competitors are very much likely to be large, more nationally established corporations rather than single enterprise, one owner, small business, as we have come to know it.

Mr. McKINNON. Well, I think the biggest players in the travel agency business today, of course, are the bigger operators. They have bigger billings. It allows that opportunity, but it also allows new, small ideas to come along, too. Every idea that ever developed was a small idea, usually, when it started.

Mr. McCLOSKEY. Do you have any statistics on the ultimate impact on the consumer as far as cost or services?

Mr. McKINNON. We believe that it will help keep cost down for the consumer. The incentives will be there to keep the cost at a minimum because, for the airlines to make the kind of profits that they hope to make, you do it through keeping costs down and providing more people the opportunity to travel.

Mr. McCLOSKEY. We don't have any statistics in yet from the partial program that has been initiated?

Mr. McKINNON. No, we don't, Congressman.

Mr. McCLOSKEY. Another, probably fairly medium interest item, but of some curiosity, could you tell me why business travel departments should be compensated for their services? My line of thinking they would be the customer, really.

Mr. McKINNON. Well, they are. Personally, I agree with you in that particular instance. The Board decided, though, in the course of the case that they should have that opportunity. But it is based on their relationship with the airlines.

If the airline wants to give them that opportunity, they can do so individually.

Mr. McCLOSKEY. Thank you very much.

Mr. McKINNON. Thank you, sir.

Mr. LUKEN. All right. We have a gentleman from Florida from the full committee, Mr. Bilirakis. The gentleman is recognized for 5 minutes.

Mr. BILIRAKIS. Thank you, sir. First, I would ask unanimous consent of the committee and the chairman to submit a brief statement, along with some letters received from travel agent constituents of mine, to be made a part of the permanent record, sir.

Mr. LUKEN. Without objection, they will be made a part of the record.

[Congressman Bilirakis' complete opening statement follows:]

OPENING STATEMENT OF HON. MICHAEL BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, I am pleased that you have permitted me to join you and the other members of the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business as you assess the impact of deregulation of the air transportation marketing system. Even though I am not a member of this particular subcommittee, I have a sincere interest in the travel industry which is so vital to the Ninth

Congressional District in Florida, which I represent, and for the entire State of Florida, which is so dependent on tourism.

Having read over the testimony that has been submitted, it is clear to me that the consumers of this Nation have been fortunate to have small businesses serving their travel needs with efficiency, integrity and the benefit of competitive pricing of air transportation.

The travel agency industry is a successs story for small business, which predominates in this industry, and the industry provides jobs. We have seen, as a result of the Civil Aeronautics Act passed in 1938, a good, substantial working relationship between the airlines, government and small business. The public has greatly benefited from this arrangement.

The travel agency industry as we know it, is truly competitive with numbers of new entrants into the industry each year, all of whom must meet certain minimum accreditation requirements set forth by the Airport Transport Conference. Once they have met minimal requirements, these agents automatically become the agent for all airlines that belong to ATC, which is the majority of all domestic carriers in this Nation. Additionally, they are also appointed as agents for international airlines. For an agency to be a member of the ATC and an agent for all airlines, means that consumers have the opportunity to do one stop shopping for their transportation needs.

If the present system is radically disrupted, as suggested by the CAB, effective January 1, 1985, it may be that consumers will need to go to numerous agencies to work out travel plans for a trip requiring several different carriers. This appears to me to be nonsensical and an imposition of a substantial burden on the American public that is already confused by different airline rates and gimmicks.

Even though deregulation is consistent with my conservative philosophy, I find it difficult to intellectualize the actions of the CAB in this matter, since the present system requirements are not onerous to business and do not appear to add to the costs of travel to consumers. What it does do, is ensure that the people of this nation have access to an orderly air transport marketing system that provides good service at competitive rates.

It appears to me that the CAB has erred in this matter. The decision of the Administrative Law Judge Yoder should be accepted, and the current antitrust exemption be maintained. If it could be proven that a monopoly exists because of the present antitrust immunity, which the testimony today has not proven, and we weren't seeing new entrants into the travel agency industry, I might look on this matter through different eyes.

However, I believe what we are really seeing is a cohesive group which includes travel agents, airlines, both domestic and international, all in support of a common goal-maintenance of the status quo, which more than adequately addresses the needs of the American public. On the other hand and the group opposed to Judge Yoder's decision, are representatives of major corporate travel departments opposing the present working system. I am the first to support the free enterprise profit oriented business of this country. I believe in it. However, in this case, I must support the small businessman and woman, who are the backbone of this nation's travel agency industry, against international giants who would change the present system, to no system at all in order to gain a maximum profit on their corporate travel, with little thought for the disruption this would cause the consumer who is so dependent on his local small business travel agency. The remedy for these corporate travel departments presently exists now, and it appears that it is a matter of negotiation between them and the carriers.

I wish to thank you for this opportunity to join you today, Mr. Chairman, and members of the Subcommittee.

Mr. BILIRAKIS. Thank you. Mr. McKinnon, you were asked by the chairman, what brought all this on. I think your answer went back to the 1978 Deregulation Act.

Since then there have been approximately 3 years' worth of hearings, or 40,000 pages of testimony. An administrative law judge has come up with a decision, a recommendation, I guess, a recommendation contrary to yours.

Mr. MCKINNON. Yes, sir.

Mr. BILIRAKIS. What brought this decision on then, taking into consideration the 3 years of testimony and 40,000 pages of testimony, et cetera?

Mr. McKINNON. What brought all this on was the fact that travel agent industry wasn't very excited about the decision we made. If they had thought we had made an intelligent decision, if they had thought what we did was wise, if they thought probably what we did didn't interfere with the possibility of anything that they did, they probably wouldn't be unhappy today. But they perceived that there is a threat to them here, and I think anytime anybody perceives a threat, they are not very excited about somebody else's action.

Mr. BILIRAKIS. You are not telling me that the travel agency industry is happy about a corner drugstore being able to issue airline tickets and travel tickets; are you?

Mr. McKINNON. Well, Congressman, I don't think any airline is going to have the corner drugstore issue a ticket, but as I point out in my testimony, the airline is ultimately responsible for that ticket. They have to provide the service or a refund. They are not going to let anybody sell that ticket where they can't guarantee that they are going to have control over their tickets.

So there is no incentive for the corner drugstore. I mean, that is sort of an alarmist's attitude to think that every little lemonade stand is going to sell airline tickets. The airlines are going to be very careful and very selective who they allow to control that valuable ticket stock, because it represents money to them.

Mr. BILIRAKIS. Yes, I am aware of that. What happens to the area bank, the central accounting system that now exists in the industry?

Mr. McKINNON. That remains in effect.

Mr. BILIRAKIS. That remains in effect?

Mr. McKINNON. Yes, sir. It is a good system.

Mr. BILIRAKIS. Yes. It is a good system. So what we are saying is that whether it be the corner drugstore or whether it be that what is now the BTD or whomever, they would be feeding into the area bank?

Mr. McKINNON. Basically, the travel agents feed into the area bank. Any new system that comes along could or could not feed into it, depending on whatever develops down the road.

Mr. BILIRAKIS. If these new guys who are not regulated travel agents don't feed into the area bank, how do we control their accountability?

Mr. McKINNON. Well, the airline controls their accountability, and the airline is not going to let anybody in—that, in a way, answers what you are saying. The airline is not going to let anybody in where they don't have absolute confidence and faith they are going to get their money and keep safe touch on their ticket stock.

Mr. BILIRAKIS. If that were the case, why is there a need for an area bank in the first place, even with travel agencies? Why couldn't travel agencies just submit directly to the airlines?

Mr. McKINNON. No. 1, it is a lot more efficient system to work that way, particularly for the airlines, as well as the travel agents. I haven't heard a whole lot of objection from the travel agent industry that that is not an effective system.

Mr. BILIRAKIS. Nor have I. Nor have I. But I guess what I am saying, if it is a proven good system, now we are talking about exceptions to that system, or possible exceptions to that system because you are going to have direct feeding into the airlines themselves in terms of these nontravel agents.

Mr. McKinnon. There are exceptions to that system now, Congressman.

Mr. Bilirakis. Sir, I am proud to say that I am a conservative Republican who is very business minded. I am not happy about regulations in general, but I think that every person in this room would say that there are rooms for regulated businesses. There is room for certain monopolies for various reasons, what are legalized monopolies, as I have always called them. Certainly for the most part the industries that are legalized monopolies are service industries. Wouldn't you consider the travel agency business a service industry, providing service to the public?

Mr. McKinnon. Yes, sir, obviously.

Mr. Bilirakis. There are certain requirements that those people be trained to some degree, perhaps probably, not always, to an adequate degree, based on my experience, and I do have some experience in this field, I don't mind telling you. I am talking about the grassroots, down-to-earth type of experience, not the ivory tower type, but they have got to be trained. What sort of training will be required of these other people? Your answer, probably, is going to go back to the airline industry is not going to let out ticket stock unless they are satisfied that somebody is trained.

I would submit to you that General Electric or Honeywell or Sperry or some of these people now who probably, for the most part, deal with travel agents, if they want to convert their BTD into a travel agency, so to speak, I don't think that the airlines are going to turn down the opportunity for the business from those people directly by demanding they must have a certain type training, by making certain types of technical demands upon them; that is just a practical thought.

Mr. McKinnon. Of course, BTD's write tickets now, but the real question—sort of answering your question with a question—is how much Government regulation do you want?

Mr. Bilirakis. I want only as much as might be necessary; period. No more than that.

Mr. McKinnon. We determined in this case that there was unnecessary Government involvement in this and that is why, in essence, we pulled the Government out of it, and that was our judgment after a long and lengthy hearing process that you mentioned, and it is after very careful analysis by people who have been successful in a variety of areas before they came to the Government.

Mr. Bilirakis. You referred to the new ideas which are not available to the travel agents as they now are constituted because they must work within certain parameters, and I certainly agree with that. They must work within certain parameters. What type of new ideas would be developed by these new people who don't have to go through the travel agent process?

Mr. McKinnon. We didn't really have any preconceived ideas of what those would be, Congressman. We just felt the great ingenuity of American free enterprise should be allowed to work. If people could invent and create different ideas that would be useful and of service to the American public, we felt that they ought to have that opportunity to do so and not be barred from being involved in selling tickets or coming up with new ideas.

Why should we stifle people's creativeness and innovativeness if it is going to better serve the American public? That is what we, in essence, decided.

Mr. BILIRAKIS. But on the other hand, sir, why should we interfere with a process that seems to be working?

Mr. MCKINNON. Well, I would submit to you if it is working, then there is no need or no desire to have change. There is no pressure to change and everything will work just fine the way that it is without the Government having to be involved and saying this is the way that it has got to work.

Mr. BILIRAKIS. Well, I am curious to hear what the AAA and the American Society of Travel Agents representatives and whatnot have to say about all this. My input from the grassroots has been that they are somewhat unhappy with the CAB's decision.

Mr. MCKINNON. Congressman, I made a couple of speeches down in your State in the last 30 days or so. Actually, when I got a chance to chat with them one-on-one, sort of away from the leadership, to a degree, I found it a very stimulating experience, and I also found out that they were very interested in what was going on and not totally opposed to what the CAB had decided, once they understood what we had decided.

There is a little confusion of what we decided. I understand, of course, their leadership now is going to send out a million pieces of mail. They want to have 640,000 of it come back to you. So I am sure you are going to be hearing some nice form letters from them explaining it, how they feel.

Mr. BILIRAKIS. Well, the couple that I have received are not form letters. They will be going into the record. I will be glad to send you copies of it.

Mr. MCKINNON. Surely.

Mr. BILIRAKIS. Well, Mr. Chairman, my concern is, of course, again, small business; it is yours and the concern of all of the panel here. We are talking about people who employ quite a large number of employees.

I don't know. It may very well work. I guess you take a chance every time you go into a form of deregulation. The deregulation that took place back in 1978 and 1979, I suppose, is working to some degree.

I oftentimes wonder how a small guy would operate under that process without computers. I don't know how many hours I have stood in travel agencies waiting for them to make phone calls trying to get a line free, trying to determine whether or not this particular route has changed, whether the price has changed, and that sort of thing.

Now, of course, with computers, if you can afford it, you just punch it in there and you get your answer. But if you can't afford it, you still have the same sort of delay; that is the result of deregulation.

Mr. MCKINNON. Congressman, I would just make one observation. You all come from areas that with this time of recession has certainly had financial problems. It is my understanding that last year 50,000 businesses entered chapter VII or chapter XI bankruptcy.

Those businesses went out in the free marketplace and competed; unfortunately they lost.

How do you tell one industry that grew by 9 or 10 percent in the last few years that you are going to pass a piece of legislation that says we are going to protect you in the way you do business, and then you go back home and you tell those people that are unemployed and looking for jobs whose businesses went out of business last year, we are going to protect this one industry, we are not protecting yours, you go out and find a job. But these people who grew by 9 or 10 percent last year, we are going to protect them. How do you do that?

Mr. BILIRAKIS. Well, you do that, sir, because the nature of the beast, the nature of the industry is such that there has to be some sort of controls, just like there is in the public utility industry, and so many others of these legalized monopolies.

You do that because these people have had to meet certain requirements to become travel agents. By the way, those requirements are not onerous.

It isn't that difficult. You have to have a little bit of capital in order to open up a travel agency. I sometimes wonder why all of these operations that would be available as a result of this further deregulation, I oftentimes wonder why don't they just become a travel agency, and then there wouldn't be any problem.

Granted, they would have to work within the parameters, but if those parameters are bad, that is the job of the CAB to get them changed. They can be changed along with IATA and with ATC and similar groups.

All right. I think my time is up. Thank you, Mr. Chairman.

Mr. LUKEN. All right. We do have another witness. Congressman Boner is here.

I want to pursue one question. Is it true that the CAB is now considering removing antitrust immunity from other conference agreements, such as the airline ticket offices that serve Government facilities?

Mr. MCKINNON. What we did on that, Mr. Chairman, was, we did remove on the SATO's, which, in essence, the travel agents ought to be pretty excited about because it allows them to be able to compete with ticket sales on military bases. We proposed it, but it has not been done as yet.

Mr. LUKEN. You are considering removing it on sales?

Mr. MCKINNON. Yes, sir. That is before the Board right now, and when things are before——

Mr. LUKEN. Are there any other agreements being reviewed by the Board that you can tell us about in this industry?

Mr. MCKINNON. I don't think that we can think of any new, creative, innovative ones. We are always looking at agreements, and there are amendments that come along, but no new, bold initiatives that I am aware of.

Mr. LUKEN. All right. We thank you very much. We thank all of you for your attendance and your early arrival.

Mr. **McKinnon**. Mr. Chairman, we have the greatest respect for your committee, and we just appreciate the opportunity to be here and share with you today.

Mr. **Luken**. You have been very, very helpful.

Congressman Boner of Tennessee. Congressman Boner has been the principal architect of legislation in this area in the last Congress, and has had a long-standing interest in these issues. We are very pleased to have him here to help us this morning.

TESTIMONY OF HON. WILLIAM HILL BONER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. **Boner**. Mr. Chairman, thank you for allowing me to be here. I have just two pages of prepared remarks I would like to attempt to read and summarize, and then I would like to make a couple of comments concerning questions that I have heard while I have been here.

I think I should say, first of all, that Mr. Dan McKinnon made a special effort to come to my office and talk to me about this issue. I think it is an example of where someone in the bureaucracy of this Government is interested in trying to share his concerns, and for that, I think he demonstrated something that we don't always see in the Congress, and that is, people from the agencies trying to come over and communicate and iron out our differences.

Mr. Chairman, members of the subcommittee, as chairman of the Congressional Travel and Tourism Caucus, it is a pleasure for me to be here today to discuss an issue that could shape the way that we utilize the services of the tourism industry in the future.

The decision of the CAB in its competitive marketing investigation and its impact on the tourism industry is of great concern to the Travel and Tourism Caucus.

Although this hearing will concentrate on how travel agencies as small businesses will be affected by the CAB decision, I believe that it is also important to examine its effects on the industry as a whole.

America's tourism industry accounts for nearly 1 million of the 14 million business establishments in the United States. It includes airlines, hotels, motels, attractions, rental car companies, bus and rail lines, cruise lines, convention and visitors bureaus, State government travel offices, food service establishments, travel agencies, and many other enterprises providing services to travelers. Because 99 percent of all business in the tourism industry come under the definition of a small business, it is essential to recognize the common bonds that link these diverse enterprises into a single industry.

While all of these groups certainly compete with each other for consumer dollars, they also rely on systems and methods of operating that have developed over the years to coordinate their efforts.

For the past 40 years, the travel agency system has served as an efficient and reliable network that provides quality service to consumers of transportation.

As a rule, I think that we can say that the travel agency system has been an efficient and reliable network for the consumers who attempt to travel not only on the airlines, but also on other modes of transportation.

The agency system, as we know it today, evolved over the course of years to meet the demands of the marketplace, while at the same time establishing credibility with the American traveler.

In the late 1920's, when the airlines first showed strength as a viable mode of transportation of passengers, they looked for various methods of breaking into the travel market to compete with the rail and steamship carriers. In doing so, they used a multitude of outlets for the sale of tickets. Tickets were given indiscriminately to virtually anyone the airlines felt could produce a passenger. Everyone from the hotel porter to the local barbershop operator was in on the act.

Experience soon showed that the use of nonprofessionals was causing a great disservice to the traveling public, and to the airlines. Because there was no coordinated system, there was no way of assuring the public that the tickets were valid or that the service would be provided as promised. To correct that situation, the Civil Aeronautics Act of 1938 permitted the airlines to reach joint agreements, and provided the travel industry with an opportunity to develop a standardized travel agency system. The industry agent system created by these agreements has contributed to the ability of the industry to serve the public even during this confusing time of deregulation. The system allows ticket exchangeability, interline passenger and baggage exchange.

Mr. Chairman, if the CAB's decision is allowed to stand, we will be going backward instead of forward. We will be disrupting a system that works and has worked for better than 40 years.

To open up a travel agency, each agency must meet certain qualifications that are established by the trade associations of airlines. For domestic sales, the rules are set by the Air Traffic Conference of America [ATC], and for international sales, the International Air Transport Association [IATA] is the governing body.

There are no other nationwide organizations that establish qualifications of financial responsibility for travel agents. Consequently, all suppliers of travel services rely on the airline conference system approved agents. While there are standards of professional competency and financial responsibility that travel agencies must meet, there are no strict barriers that prohibit companies from entering the marketplace. As a matter of fact, approximately five travel agencies open up every day. If we revert back to the days of allowing anyone in the country to sell tickets, simply to promote competition in an environment that is already competitive, we will be creating a chaotic situation for the American consumer. We will be removing safeguards that protect the public from fraud and abuse.

The CAB's decision does not appear to have been made on the basis of evidence showing that something was wrong with the current system that needed to be corrected. It appears, instead, that they have made this decision on the basis of academic theory, that a free market will more efficiently provide travel services to the public.

On the other hand, the administrative law judge's decision injected new competition into the industry, while preserving the essential elements of the agency distribution system. The judge's decision is clearly based on the evidence that was presented to the commission.

It was based on the history of the travel agency business and on the lengthy hearing record that examined all facets of this complex industry. After 3 years of reading some 40,000 pages of testimony, even the administrative law judge couldn't recommend an alternative that would serve us better than the present one.

Mr. Chairman, I would like to make an important point which I have raised in prior discussions with the Chairman of the CAB.

It seems unusual that members of the CAB would invest in the use of an administrative law judge, for the purpose of hearing the facts of the case and receiving testimony and yet for all practical purposes, the CAB staff ignored almost everything that the administrative law judge recommended.

It is quite apparent that the members of the CAB did not devote the time necessary to fully understand the complexity of this problem. It seems particularly perplexing that the CAB would allow the various parties involved to incur expenses and invest their time and efforts during a 2½-year period, only to override the logic presented in some 40,000 pages of testimony.

It seems to me that we are running afoul with our system. Mr. Chairman, legislation has already been introduced by Glenn Anderson which would direct the CAB to adopt the administrative law judge's recommendation. That recommendation would retain agent exclusivity and the basic framework of the airline ticket distribution system. I believe the passage of this legislation is needed if we are to reserve the public benefits of the travel agent market system. It would assure the public that they can continue to receive expert advice from travel agents on all matters related to traveling.

One of the comments that I say concerning the involvement of Government in our free enterprise system, whether we like it or not, there has to be an involvement in Government. I, like others on your committee, believe that that involvement ought to be minimal, but I think we don't want to see another Love Canal around this Nation.

As a result of the inactivity of the EPA, we have seen waste site after waste site pop up and realized that the American public needed to be protected.

So I think that there has to be a decision, and that decision lies in the Congress as to what is the Federal Government's role in the protection, not of the travel agent, but in the protection of the public, and what they have a right to expect.

I don't think that there is anyone here who doesn't recognize that if there were not certain regulations in this particular area, that there could very easily be injustices, abuses and even fraud perpetrated on the traveling public.

So I think that there is a place for Government.

I recognize that there is a role and a responsibility for Government. Our Government cannot be totally out of the free enterprise system, nor should it completely dominate the free enterprise system.

I think that the consuming public ought to be able to recognize and to have confidence in knowing that when they buy a ticket, there is a pledge from the airlines to honor it, and a system in place that will allow the ticket to be honored in the event that the travel agent is disreputable.

Mr. Chairman, to those who say, perhaps Government should not be involved. I would like to cite a similar example related to the regulation of health spas.

Many people across this Nation were sold lifetime memberships in health spas only to find that those health spas were never built. I make this point to emphasize the possible harm to consumers that can result from fraudulent activities in the marketplace.

Last, Mr. Chairman, when we talk about antitrust, I can't help but believe that if the CAB decision stands, anyone who is refused the right to sell tickets for an airline could conceivably go to court and receive the right to sell those tickets. It is my belief that the courts would decide in favor of any business that wants to sell these tickets, because by not doing so would be viewed as a restraint of trade.

I think, Mr. Chairman, this hearing will help to bring out some of the points that need to be made. I appreciate the opportunity to be able to testify and would certainly answer any questions that you might want to ask.

Mr. LUKEN. We thank the gentleman from Tennessee and recognize his aggressive leadership on behalf of the travel and tourism industry which is so vital to our economy and to our entire country.

I think you have made the salient points very effectively.

I might add that in my brief experience here, I have seldom encountered an industry which is a prosperous one in difficult times, and is, at a time when questions are raised about competition, extremely competitive, and admitted to be so even by those who want to tinker with it.

There is widespread proliferation of participation, shall we say. The language is a little strained, but being part of this industry where there are so many participants, and whose number is increasing, they stay on the small business side of the scale, and we just don't seem to have the antitrust problems that we have in many industries. It may just be a classic case where things are going well and the idea of tinkering with it or doing more than tinkering with it because the participants who are talking to us, including the gentleman from Tennessee, believe that this decision may have a major effect, striking at the very vitals of the industry.

We thank the gentleman.

Mr. BONER. Thank you, Mr. Chairman. You know, I would like to maybe leave with one comment, and that is when I was a young guy growing up about 70 or 80 years ago, I remember that we saw the change in the way that cereals were being promoted.

Tony the Tiger had taken on some new stripes, and everybody had gone to a new system. Then I will never forget, Quaker Oats had a commercial, and the little guy came out, you know, the little Quaker with the mustache and the bit, and they said, "Well, why haven't you changed?" The little statement that he made on the commercial was, "When you have got a good thing, don't change it."

Mr. Chairman, I think when we have something that works, that has not been proven to be of disservice, and as was certainly pointed out in the questioning earlier, it doesn't take that much. Anybody can be a travel agent, but we like to know that there are certain qualifications that a person has to strive to reach.

Again, Mr. Chairman, we have a good system, and I don't think that we need to change it.

Mr. LUKEN. Thank you, Mr. Boner.

We will move right along to a panel consisting of Mr. Gabriel Phillips and Mr. John Meredith.

You gentlemen are listed here as a panel. I am sure you want to give your individual testimony. Mr. Gabriel Phillips, you are the senior vice president of traffic services of the Air Transport Association of America. Is that right?

PANEL CONSISTING OF GABRIEL PHILLIPS AND JOHN D'A. MEREDITH

TESTIMONY OF GABRIEL PHILLIPS, SENIOR VICE PRESIDENT, TRAFFIC SERVICES, AIR TRANSPORT ASSOCIATION OF AMERICA

Mr. PHILLIPS. Yes.

Mr. LUKEN. Do you have prepared testimony that has been distributed?

Mr. PHILLIPS. Yes.

Mr. LUKEN. Without objection, it will be admitted into the record of the subcommittee. Mr. Phillips, you may proceed to tell us what you think would be helpful.

Mr. PHILLIPS. Fine, Mr. Chairman. I did bring two of my colleagues along with me in the event the committee had some technical questions.

Mr. LUKEN. If you wish them to come up to the table, that will be fine.

Mr. PHILLIPS. I think they are available nearby, so that won't be necessary. Jack Hempstead and Jerry Huisentruit.

Mr. LUKEN. Properly marked exhibit A and B.

Mr. PHILLIPS. Thank you. Then, if I may, I will abbreviate my statement with the understanding that you will put it in the record.

Mr. LUKEN. It is already in the record, and just approach it in whatever way you think will be helpful.

Mr. PHILLIPS. Mr. Chairman, and members of the committee, ATA, through its traffic services division, the Air Traffic Conference, administers a comprehensive travel agency program. This program, as you all are aware now, is the subject of the recently concluded CAB decision in the competitive marketing investigation, or the CMI.

The CAB's decision, as we see it, could well have a far-reaching impact on the consumers, the travel agency community, and on the way the airlines and other travel suppliers market their services.

We, therefore, especially appreciate the opportunity to appear before this subcommittee in its review of the impact of that decision.

As you have indicated in your opening statement, the recognition that the travel agency program is a big business, largely made up of small businesses.

The ATC agency program, Mr. Chairman, is established by a series of airline agreements which prescribe rules for the appointment of travel agents and for the maintenance of their subsequent approval under the program, also for the reporting and remitting of airline moneys that are sold on a daily basis by the agents, then, also, for the operation of the area settlement plan, which is the settlement mechanism between the agencies and the airlines.

This program dates back to the early 1940's, although it has been modified continually since then. It was developed to provide a pervasive, integrated network of airline service, under which each airline sold the services of its competitors and where travel agents were appointed to sell on all airlines in serving airline consumers.

These important interline sales functions continue today for over one-third of all travel agency sales involve the services of two or more airlines. IATA, as John Meredith will point out to you subsequent to my testimony, has developed a companion appointment system which is nearly identical to the ATC program and virtually all ATC appointed travel agents also hold IATA appointments.

IATA airlines rely on the ATC area settlement plan for processing agent sales reports and remittances. So our discussion of the travel agency program generally encompasses both the ATC and IATA programs.

Mr. Chairman, my statement contains a detailed listing of the rules on how to become a travel agent, and how the area settlement plan operates, and I won't go into those in any greater detail right now. But in turn for these rigorous rules which the agents must follow in becoming a travel agent and handling these sales, the airlines have given the agents something in return, that was the exclusive right to be the distributor or seller of air transportation.

By that, they have said that airlines who are parties to these agreements will only appoint ATC-approved sales agents, and they will only pay ATC sales agents for the sale of air transportation. This is the term known as exclusivity which was the subject of a lot of debate in the CAB decision. These agreements, because they effectively established exclusionary rules and imposed sanctions, are antitrust sensitive and require and have received antitrust immunity or immunity from the antitrust laws, which CAB is empowered to give, and it is this power which gives the CAB jurisdiction over the program.

The travel agency program today, as you have heard, is a comprehensive program. There are some 16,500 agency entities, with 21,500 office locations around the United States, each of which has been accredited under the ATC agency program. The system is highly competitive. The number of sales outlets increases by about 2,000 a year, or 9 to 10 percent. Last year, agents sold some $22 billion of domestic and international airline sales. That was an increase of 9 percent over the previous year.

For these sales, agents received about $2 billion in commissions from the airlines. The ATC accredited travel agent is truly an industry agent, a status reached under a centrally administered industry system, for once the agent is given accreditation, he is automatically appointed as agent for all the airlines in the program. Because the airlines have interline agreements with one another, the agent is immediately able to sell a ticket anywhere in the world.

This brings me to the CAB decision. Mr. Chairman, as you are all aware, the Board departed from the administrative law judge's decision in two major respects. While it approved the ATC agency program as being in the public interest, it did say that it would not support the exclusivity provision with respect to having agents be the exclusive people entitled to earn compensation for sale of airline tickets.

Second, the Board refused to extend the approval of antitrust immunity beyond 1984. It is these two features which have caused all of the concern in the airline industry and the travel agency community.

The Board has relied on its mandate in the Deregulation Act of 1978 as the impetus for its investigation and its decision, and it is true that the Congress gave the Board a new mandate in 1978 to look at the regulation of airlines and to make it procompetitive.

But in the process, the Congress retained in Section 412 and 414 power in the CAB to review and approve airline agreements which were in the public interest and to exempt them from the antitrust laws where there was an overriding transportation need.

That provision was long standing. It continues today. The Congress did not tell the Board to do away with all antitrust immunity, or else they wouldn't have retained 412 or 414.

In any event, Mr. Chairman, we are concerned that after the 1984 period expires, that the risks of trying to maintain the program in its present form would be too great, and that the airlines just simply aren't going to do it.

We also believe that to change the program, to make it operate under the antitrust laws would so gut the features of the program that make it useful today that it wouldn't be worth having one.

So, for this reason, we urge and seek to have the antitrust immunity and the basic parts of the agreement and the program retained on an indefinite basis.

We, therefore, urge this subcommittee in its report to conclude that the existing travel agency program enhances small business development, is in the public interest, and that you, therefore, will recommend to the Public Works and Transportation Committee that appropriate legislative action be taken promptly to preserve the existing travel agency program, and to continue, if necessary, antitrust immunity.

With that, sir, my statement is concluded, and I will be prepared to answer any questions that you may have.

[Mr. Phillips' prepared statement with attachments follow:]

PREPARED STATEMENT OF GABRIEL PHILLIPS, SENIOR VICE PRESIDENT, TRAFFIC SERVICES, AIR TRANSPORT ASSOCIATION OF AMERICA

My name is Gabriel Phillips. I am Senior Vice President, Traffic Services, of the Air Transport Association of America (ATA), which represents the certificated, schedule airlines of the United States. I am accompanied by Jack B. Hempstead, ATA Vice President, Travel Agency Administration, and Jerome F. Huisentruit, ATA Assistant General Counsel.

ATA, through its Traffic Services Division, the Air Traffic Conference (ATC), administers a comprehensive travel agency program. This program is the subject of the recently concluded Civil Aeronautics Board (CAB) proceeding, generally know as the Competitive Marketing Investigation or CMI. The CAB decision could well have a far-reaching impact on the consumers, on the travel agency community and on the way airlines and other travel suppliers market their services. We, therefore, especially appreciate the opportunity to appear before the subcommittee in its review of the impact of the CAB decision on small businesses.

The travel agency program is a big business largely made up of small businesses. That is why it is most appropriate that this subcommittee consider this subject. The average travel agent office has six employees. A survey we conducted late last year shows that 75 percent of all agency entities had annual gross sales of less than $2 million. (See Attachment I). In terms of airline sales processed through the ATC program last year, 68 percent of the agency locations had less than $1 million in sales. About 30 percent sold between $1 million and $5 million. Less than 2 percent had sales of $5 million or more. An Agent's net operating revenue, or commission, is equivalent to about 10 percent of its sales. Thus, an agent with $1 million in sales retains about $100,000 as net revenue for use in the business.

THE ATC AGENCY PROGRAM

The ATC Agency Program is established by a series of airline agreements which prescribe rules for the appointment or qualification of industry-approved travel agents, for the reporting and remitting of funds for airline sales, and for the operation of the Area Settlement Plan. The program dates to the early 1940s, although modified continually since then. It was developed to provide a pervasive, integrated network of airline services where each airline sold the services of its competitors and where travel agents were appointed to sell on all airlines in serving airline consumers. These important interline sales functions continue today, for over one-third of all travel agency sales involve the services of two or more airlines.

The International Air Transport Association (IATA) has developed a companion appointment system, which is nearly identical to the ATC program, and virtually all ATC-appointed travel agents also hold IATA appointments. IATA airlines rely on the ATC Area Settlement Plan for processing agent sales reports and remittances. So, our discussion of the travel agency program generally encompasses both the ATC and IATA programs.

Attached to this statement is a description in greater detail of the appointment and reporting/remittance features of the program to give the subcommittee a clearer idea of how the agency program works. (See Attachment II). The program's detail rules and procedures are set forth in the ATC Travel Agent's Handbook, which is provided to each travel agent and which has been furnished to the subcommittee staff.

In exchange for the rigorous rules under which agents operate, the airlines give agents the exclusive third-party right to sell air transportation—that is, airlines will appoint agents from the approved ATC list of agents and only pay approved ATC agents for the sale of air transportation. This right has commonly been termed "exclusivity".

These agreements, because the collectively establish exclusionary rules and impose sanctions, are antitrust sensitive and require and have received immunity from the antitrust laws, which the CAB is empowered to give. It is the power which gives the CAB jurisdiction over the program.

THE TRAVEL AGENCY INDUSTRY TODAY

The travel agency retail sales force is currently comprised of 16,300 agency entities which have over 21,500 office locations in the United States, each of which has been accredited under the ATC Agency Program. The travel agency system is highly competitive and the number of these sales outlets increases by about 2,000 locations or 9 to 10 percent each year. In 1982, travel agents sold about $22 billion in domestic and international airline tickets, an increase of 9 percent over the previous year. For these sales, the agents received about $2.1 billion in commissions from the airlines.

The ATC-accredited travel agent is truly an "industry agent," a status reached under a centrally administered industry system. Once accredited, the agent is automatically appointed by all ATC member airlines unless an individual airline notifies the agent to the contrary. Each appointing airline has executed interline traffic agreements with a great many other airlines. Because of these agreements, the ATC agent is able to sell transportation on virtually any of the world's airlines, whether or not the airline has appointed the agent or serves his or her locale.

This capability obviously works to the benefit of the consumer because it provides the traveler with the opportunity to make all travel arrangements through one office. The central administration, automatic appointment, and interline sales features of the program are equally beneficial to the travel agents and to the airlines because they reduce the number of contacts each would be forced to make with the other absent these agreements.

Moreover, the ATC Agency Program is relied upon by all other suppliers of travel services because there is no other system available. To illustrate the importance of travel agents to these other travel service suppliers, the average travel agency business mix is approximately two-thirds airline sales and one-third other travel services. Extrapolating from 1982 airline sales, travel agents sold more than $10 billion in other travel services. These include the travel services of bus lines, cruise lines, hotels and motels, railroads, rental car companies and tour operators.

THE CAB'S COMPETITIVE MARKETING INVESTIGATION

The CAB instituted in September 1979 a review of the ATC Agency Program to make sure that there was adequate competition in the retail distribution of airline services. It undertook this review even though none of the interested parties—the Congress, the public, the airlines or the travel agents had expressed dissatisfaction with the system. Ironically, as the CAB itself has recognized, the agency program has facilitated airline deregulation and increased competition by permitting new airlines instant access to the industrywide distribution system without the necessity or cost of establishing expensive, separate sales outlets of their own. Moreover, the travel agency community was already highly competitive, as is dramatically attested to by the rapid growth in numbers of new agency locations.

After several years of comprehensive hearings, an enormous case record, and a reasoned decision by the Administrative Law Judge, which the airlines and the travel agents supported, but which large corporate travel departments opposed, the CAB issued its decision at the end of last year and confirmed it in March 1983. The CAB departed from Administrative Law Judge Ronnie Yoder's decision in two major respects. First, while it approved the ATC Agency Program, including the Area Settlement Plan, it granted antitrust immunity only until December 31, 1984, the date the CAB is to sunset under the terms of the Airline Deregulation Act of 1978.

Second, the CAB approved the ATC exclusivity provision only as it pertains to interline sales and then only until December 31, 1984. ATC member airlines would be free to appoint agents for on-line sales outside of the Conference system until that time, and for interline sales thereafter.

Judge Yoder concluded that it was desirable to retain agency exclusivity, meaning that airlines would employ only ATC-appointed agents as non-airline sales outlets. However, he disapproved marketing exclusivity, which means that airlines could also use other sources such as Ticketron for ticket distribution. He also would have granted antitrust immunity to the program for an indefinite period.[1]

While efforts are underway to challenge the CAB decision in Court, and to persuade Congress to reverse the CAB decision in favor of Judge Yoder's, the decision is in effect today. Accordingly, the ATC has had to act to change its rules to conform to the CAB decision. Although ATC airlines have individually indicated their intention to continue to use the services of ATC-appointed agents, and not to appoint sales intermediaries outside the Conference system, ATC has had to accommodate that possibility in its rules.

Last month, the airline members of ATC adopted changes that would allow an ATC-approved agent to be also an on-line sales intermediary, provided that such online activity was carried out at a separate location and provided, also, that the agency did not hold out at that separate location that it was acting as an approved ATC agent. Furthermore, airlines could only place ticket stock with sales intermediaries which state that the ticket may not be used, exchanged or refunded except on the issuing airline. These rule changes will be submitted to the CAB for approval shortly.

Changes in the ATC Agency Program and related agreements since the Deregulation Act was enacted have already made the marketing of air transportation extremely competitive—so much so that the Board's decision adds very little additional competitive opportunity and a great deal of potential harm. A brief recital of these changes will illustrate the point, particularly as it relates to competition and small business.

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[1] The subcommittee may wish to compare the different treatment of antitrust immunity by Judge Yoder, in his initial decision at pages 207-212, and by the CAB itself in its order at pages 120-137, copies of which have been provided to the subcommittee staff.

"In 1979, the CAB held in the Transmark-General Mills case that a travel agent's payment of expenses of the customer's employees at an in-plant location was not a rebate and, therefore, not illegal, thus offering the corporate customer the opportunity for some measure of beneficial service.

"That same year, when the CAB initiated the Competitive Marketing Investigation, it ordered an end to Conference-fixed commissions. The average domestic commission rate climbed from about just under 8 percent to almost 10 percent where it has held for almost 2 years.

"In 1981, the CAB did away with the requirement that fares had to be filed for approval with the exception of the standard coach fare. On January 1 of this year, all government regulation of domestic airline fares disappeared. Both actions have allowed airlines to set any special fare they wished, including special fares for customers purchasing volume travel and allowed agents to sell at retail at any price, including a rebated price, if the agent's principal agreed."

Moreover, airlines are free to place their own ticket stock in individual agencies and in customer premises under whatever special arrangements they desire. The retail marketing of air transportation is already virtually unfettered. The CAB did not have to alter the agency program, as it did in its decision, to stimulate further competitive initiatives in retail marketing.

Yet, the CAB chose to encourage development of some new type of sales intermediary, as yet unknown, which can radically change an already significantly altered travel agency program. This industry program as constituted before the CAB decision provided enormous benefits to everyone affected by it. The traveling public has learned to rely on the professional travel agent for unbiased counseling on the best service and lowest prices for both air travel and ground arrangements. The appointment and retention standards have ensured a degree of professionalism and reliability important to the consumer, the travel agents and the airlines without unduly restricting entry. Ninety percent of all applicants are approved and the agency list, as noted, has been growing by some 2,000 new locations a year.

The system, as a whole, provides the confidence to ensure that an agency generated ticket will be honored by all airlines and that the public will be protected from fraudulent and shoddy operators.

Both the airline industry and the travel agency community fear that the CAB decision will result in the development of special airline/agency relationships outside of the Conference system to the net detriment of the industry, agencies and the traveling public. The concern is that special tie-ins between agent X and airline Y will become pervasive; once these practices start, competitive pressures will force other agents and other airlines to enter into similar arrangements. Before long, instead of the current system of agencies representing all airlines, agents will become the exclusive representatives of individual airlines. Other airlines will question whether such agents can fairly sell their service; consolidation of agents will occur to enhance agent bargaining power; the public will lose the benefit of one-stop travel services, and of agent impartiality in seeking out the lowest fares and best services.

And today, in this deregulated environment, the agency system is the linch pin which holds the interline system together. If the industrywide agency system falls apart through extensive development of on-line sales intermediaries, i.e., exclusive agents of individual carriers, there will be less and less incentive for carriers to complement and coordinate their services. Interlining is expensive—new entrants, in order to keep their costs lower than established carriers, are avoiding interlining and putting competitive pressure on those established carriers. The changed distribution system of exclusive agents would further discourage interlining.

Moreover, with the loss of antitrust immunity at the end of 1984, we doubt that the program could continue in its present form. The risk to the airlines and the cost of defending probable antitrust suits would just be too great, as Judge Yoder recognized in his initial decision. Such suits would arise from disappointed applicants, travel agents and persons who might be denied a special arrangement which they sought from an airline. In the past, antitrust complaints filed by persons dissatisfied by actions under the program have been dismissed because the program has been operated strictly in accordance with the CAB-approved agreements. It is our studied conclusion, however, that without antitrust immunity the risks involved would be too great and the potential cost too heavy for the airlines to continue the current program. And the travel agency community would lose its ability to have any say in fashioning the program.

The CAB has indicated that the program could be modified to operate without antitrust immunity. In doing so, however, the accreditation standards might become only suggested criteria. The standardized reporting and remitting requirements, and the essential centralized follow-up function might have to be abandoned. These and other changes which might be necessary would remove the very heart of the program.

There would be no confidence that travel agents were technical or financially sound. It is probable that the interline system, which the air traveler has enjoyed for decades, would be severely impacted. The economies of scale which result from the present program would be lost, since each applicant or agent could have to deal with each airline, separately—increasing the cost of doing business for these small agencies.

We believe that the withdrawal of antitrust immunity from a program which has served everyone well for almost 40 years is at best unnecessary and undesirable. The CAB's action is particularly confounding since it seems to have been taken for conceptual reasons rather than to solve a real problem. In short, the CAB has attempted to fix something that isn't broken.

We urge the subcommittee in its report to conclude that the existing travel agency programs enhances small business development and is in the public interest, and that it, therefore, recommend to the Public Works and Transportation Committee that appropriate legislative action be taken promptly to preserve the existing travel agency program and to continue its necessary antitrust immunity.

ATTACHMENT I.—ATC SURVEY OF AGENCY OWNERSHIP: SEPTEMBER 1982

[Figures rounded to nearest hundred]

	Home office locations	Related branch office locations	Total locations
Total ATC-approved agencies	15,500	4,900	20,400
Total survey responses	11,400	3,600	15,000
Percent response	74	74	74
Small business agencies[1]	8,600	1,000	9,600
Percent of total responses	75	28	64
Female-owned agencies	5,200	800	6,000
Percent of total responses	46	22	40
Minority-owned agencies	1,300	300	1,600
Percent of total responses	11	8	11

[1] Agencies with average annual gross sales of less than $2 million. Gross sales of $2 million is equivalent to net operating revenue of $200,000.

ATTACHMENT II.—SUMMARY DESCRIPTION OF ATC AGENCY PROGRAM APPOINTMENT AND REPORTING PROVISIONS

I. *ATC accreditation of travel agents.*—The ATC member airlines have collectively established a series of objective standards for the initial selection, or accreditation, of prospective travel agents and for the continuing retention by those persons of ATC accreditation. The accreditation and subsequent follow-up processes are conducted by a headquarters staff of ATA employees.

The initial accreditation standards include the following major requirements which must be met by each applicant and which must continue to be met after accreditation:

A place of business which is open to the public at least 35 hours per week for the promotion and sale of passenger transportation and general travel services;

Arrangements for the secure storage of tickets and ticketing equipment;

An experienced full-time manager;

The same, or another, full-time employee with ticketing and other technical experience;

A bond of $10,000 at minimum to protect airline ticket stock.

The applicant provides this and other related information to the ATC which verifies for accuracy and determines that the standards are met. If so, the applicant is included on the list of ATC accredited travel agents. He or she is automatically appointed by all ATC member airlines as their legal agent unless an airline notifies the agent to the contrary, and is eligible to sell transportation on those and other airlines and to receive commissions from them. The new agent is provided with blank tickets by the ATA staff and obtains other equipment from the airlines and from equipment vendors.

Applicants which are denied automatic accreditation may appeal their case to the office of the Travel Agent Commissioner, whose decision is binding on the carriers. If the applicant is dissatisfied with the Commissioner's decision, the applicant may carry his appeal to an arbitration tribunal for resolution. These processes are also utilized in the case of certain rule infractions by accredited agents.

Essentially the same accreditation procedures are followed in the event a travel agent wishes to open a branch office location and the same appeal processes are available in such instances.

II. *Reporting of and remitting for ticket sales—the area settlement plan (ASP).*—The reporting of and remitting for ticket sales is accomplished through the second part of the ATC agency program—the Agent's Standard Ticket and Area Settlement Plan or ASP. Although individual airlines may provide their agents with the airline's own ticket stock and make separate arrangements for the reporting and remitting of ticket sales, the preponderance of all sales by U.S. travel agents is made through the ASP.

All travel agents are provided with standard, blank ticket stock instead of the separate tickets of each appointing airline. When a ticket is sold, it is imprinted with the name and identification of the travel agency and the name of an airline, generally a carrier which participates in the transportation. The ticket then becomes a legal document of that carrier.

Once each week, the agent sends the auditors coupons of all tickets issued that week to a designated area bank/data processing center. The agent's geographical location determines the center which is used.

The centers serve as clearing houses for the weekly reports from a large number of agents. The centers prepare a sales report for each travel agent, determine the amount of money owed to each airline whose name is imprinted on the ticket, draw a check against the agent's bank account for the aggregate amount owed by each agent (after deducting commissions), remit the amounts to the appropriate airlines, forward the auditors coupons to the airlines and return the sales report to the travel agent. The centers check for the timely receipt of the agents submissions, the accuracy of computations and the numerical sequence of tickets on each report. They do not otherwise audit the tickets. Questions related to fares, commissions claimed and the like are handled between the agent and the individual airlines.

There are presently six area banks/processing centers in the United States which operate under contract with the ATC. In 1982 the area banks processed a total of 125 million documents, a 17-percent increase over 1981.

The Area Settlement Plan is available for utilization by virtually any air carrier. At the present time, 159 airlines participate in this part of the ATC agency program.

In addition to the requirement that travel agents report ticket sales on a weekly basis, the airline agreement also provides that repeated late remittances or other financial irregularities, short of actual defaults, will result in sanctions applied to the agent. The sanctions result either from a complaint filed with the Travel Agent Commissioner by the ATA staff or through a written settlement between the ATA and the offending travel agent. The sanctions may include termination of the agents accreditation, suspension of the accreditation for a period of not more than ninety days, a fine of not more than one-thousand dollars, etc.

In the event a travel agent does not submit his weekly report within ten days after the close of the sales report period, or if the check drawn on the agents account by the area bank is dishonored, the ATA acting on behalf of all carriers will withdraw all tickets and identification plates from the travel agents. Unless the amount due is paid within thirty days, the ATC accreditation of the agent is withdrawn and the agent's ability to sell domestic air transportation on behalf of the ATC member carriers is terminated. Special provision is made for agents who can pay a part of the amounts owing so that they may stay in business and satisfy the remainder of the debt over a period of time.

Last year there were 254 agents declared in default on behalf of the carriers, owing them approximately $13.8 million.

Mr. LUKEN. Mr. Meredith, you are general manager, North Atlantic Division, British Airways.

TESTIMONY OF JOHN D'A. MEREDITH, GENERAL MANAGER, NORTH ATLANTIC DIVISION, BRITISH AIRWAYS, ON BEHALF OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

Mr. MEREDITH. That is correct, Mr. Chairman.

Mr. LUKEN. Do we have your statement?

Mr. MEREDITH. Yes, you do.

Mr. LUKEN. Without objection, it will be received in the record of the subcommittee, and you may proceed to tell us the substance of that testimony.

Mr. MEREDITH. Thank you, Mr. Chairman.

I am here on behalf of the International Air Transport Association known as IATA. I am accompanied by Mr. Enrique Fierro, who is the manager of industry affairs, North America, for Swiss Air.

If I may, I would like to summarize briefly some of the main points in my submission. Before I do so, I would like to make five comments on Chairman McKinnon's statement which I think might be relevant.

First of all, the Chairman said the CAB decision will give a greater variety of prices. Internationally, that is not true. Governments approve prices internationally. I only wish I could file any fare I liked, but there is a government in the United States and a government in the United Kingdom who have to approve my prices before they can be sold.

The decision of the CAB does not mean in the competitive marketing case that there will be a greater variety of prices. Internationally, that is not so.

Second, he said it was the CAB that made airline agreements possible. I would submit that it was the Congress who made airline agreements possible by allowing the CAB to grant antitrust immunity.

The original impetus comes from the Congress, not from the CAB. Third, he said, and this is a point which you, Mr. Chairman, and Congressman Weber, have commented on, if a person is good at what he does, he does not need to fear competition.

I only wish that that was true. If that was so, why is there antitrust legislation. The Congress obviously thought some protection was necessary.

The fourth point, the chairman seems to object to standards for agents, what he calls exclusivity. I don't know what is wrong with standards in a service industry.

If I may, Mr. Chairman, may I tell you a brief story of a mythical chairman of the CAB. I stress "mythical." He needed a brain operation.

He ended up on the operating table and he looked around for his surgeon. Well, he couldn't see his surgeon, all he saw was a plumber with a big bag of tools.

He said to the nurses, "Where is my surgeon?"

The nurses said, "Mr. Chairman, surely they have told you. We have deregulated the surgeon industry."

Finally, Mr. Chairman, Chairman McKinnon said that somehow the CAB and the Government were paying for regulating agents. I would submit to you it was IATA and ATC who have been paying for the regulation. It is IATA and ATC who have been running the agency programs that pay the bills.

I don't think, really, the agency programs and the regulation which we have in the programs is costing the taxpayer much money. We are paying for it ourselves.

Now, if I may summarize some of the main points in my testimony.

IATA is a voluntary organization made up of most of the world's scheduled airlines, over 120 in all. For many decades, IATA's members have established by agreement the minimal standards for accreditation of their commonly appointed passenger and cargo agents employed in countries around the world, including here in America.

Under IATA rules, these agreements are reached by unanimity, one vote, one carrier, regardless of size or which country the carrier is from. As such, these agency agreements embody a true worldwide consensus on the minimal qualities which the international carriers' agents must have.

As you know, Mr. Chairman, most of the appointed agents resulting from these agreements are small businesses. One may well ask, then, why should the world's carriers devote so much time and energy to these programs if the end result is merely an appointment of a small travel agent located in a small town in, for example, Kansas or Ohio?

The answer is very simply market access. For example, in this huge country of America, no single international carrier could hope to reach all American consumers without a very extensive and prohibitively expensive distribution system. You must remember that most international carriers, particularly the foreign flags, have only a few U.S. points which they serve, and these are usually the gateways concentrated on the sea coasts.

An extensive, low cost distribution system of travel agents is, therefore, the only realistic answer for selling international air services in the United States and in many other countries.

The IATA/ATC agency programs solve this distribution problem in the United States through administrative cost savings, tremendous scale economies and, of course, common agency accreditation acceptable to all carriers.

It is this last element, joint appointments, which gives each new agency, no matter how small, the ability to represent virtually all the world's airlines when it starts into business. But this cooperative solution to the airline's distribution needs obviously requires a network of carrier agreements to bring it about.

There is simply no other way to achieve all this without prior airline understandings on agency accreditation standards, the procedures and mechanisms for common agency administration, the criteria for using airline stock acceptable to all carriers, and the apportionment of costs amongst the carriers and agents.

Mr. Chairman, what the world's carriers and ATC have achieved in this country is truly remarkable. Today there are over 20,000 IATA/ATC agents approved to sell international travel. These agents, most of whom are very, very small, are vitally important to maintaining the international air services this country enjoys. Some 80 percent of international ticket sales are made through

IATA travel agents. To illustrate this point further, my own airline in 1981-82 fiscal year, 90 percent of our United States IATA agents produced less than $38,000 in annual sales for British Airways, less than $38,000.

Those 90 percent accounted for 43 percent of our total passenger revenue. So nearly half our total passenger revenue came from agents who gave us each less than $38,000. That point is in my full evidence, Mr. Chairman.

Under our program, no carrier can be denied access to these agencies, and since most agents represent a great number of the world's carriers, the individual consumer shopping in an agency is in a position to compare prices, schedules and services of virtually all competing carriers at a single location.

In other words, there is plenty of competition. You can compare and find out what is best. In short, the consumer need not travel all over town or spend hours on the telephone trying to find out what is the best deal. He simply needs to go to his industry travel agent.

Incidentally, if he doesn't like that one, he can go to another one. There is plenty of competition. There are over 20,000 of them all over the United States. I should add, Mr. Chairman, that under our programs there are no quotas on the number of new agents which can enter the market, nor do any agents enjoy exclusive marketing areas. Because even the smallest agent can represent all the world's carriers, there is very little opportunity for the small agent to be forced into the position of having to represent only a handful of carriers and no others. Because IATA agents are qualified before they go into business and all carriers are prepared to deal with them as a new entrant, regardless of their size, there has been historically a very low failure rate in the agency business in this country. This, in turn, helps support the great consumer confidence which agents have earned under these programs over the past decades.

The air transportation distribution system is, therefore, a shared enterprise which no single carrier could ever hope to duplicate. Through this system of thousands of commonly appointed agents, each consumer has direct access to the worldwide integrated air transportation system.

Conversely, through this same system, each carrier in the world has direct access to the American consumer. In a word, this is a unique and rather marvelous form of cooperation on a global scale which benefits everyone—the consumer, the small business travel agent, and the air carriers.

Mr. Chairman, because small businesses are the heart of this great and unique distribution system, it is very timely that this subcommittee is now looking into this whole subject. As you know, and you have heard, the CAB has just finished a 3½-year study of the carrier agreements which support the IATA/ATC agency programs.

On the whole, the Board has nothing but praise for the public benefits these programs and their travel agents provide. For example, the Board recognizes that the ability of small entrepreneurs to become travel agents is much greater than it would be without commonly agreed carrier standards.

Mr. LUKEN. If I may interrupt, I think your observation is correct as to the Board, and that continues to be true throughout this hearing. I listened to the chairman this morning. He found no criticism or fault.

His theoretical pursuit of deregulation as a goal in itself apparently drove him to this decision.

Mr. MEREDITH. I think I must leave the committee to decide, but what I can say to you, Mr. Chairman, is although they found no fault, they went on to do something, which could destroy it, the point I wish to make in a moment, but I agree with you.

Mr. LUKEN. Well, I was not trying to derail you at all.

Mr. MEREDITH. Entrepreneurs need only file one application with ATC and one with IATA to represent all the world's carriers. Think what a nightmare it would be for a small businessman trying to represent all the world's carriers if he had to deal individually with each one.

I have to deal with lots of carriers, gentlemen. It is a nightmare.

But, Mr. Chairman, when the Board came to decision time, it stopped short of providing a crucial element within its power to make the continuation of the IATA/ATC programs a practical certainty.

The Board declined to grant these programs antitrust immunity, even though they had done so for the past 40 years and even though there was no question at all that the Board had this authority from Congress.

Thus, under the Board's competitive marketing investigation decision, this great global enterprise—four decades of work—might effectively have been dealt a death blow. Beginning at the end of next year, the carriers and the commonly appointed agents alike will be exposed to antitrust lawsuits by those persons who either cannot meet the industry standards or want those standards to be changed.

The threat of these lawsuits is an arrow pointed directly at the heart of the international carriers' vital distribution system in this country. These same lawsuits threaten the livelihoods of thousands of small agents now collectively appointed under these programs.

I must tell you, Mr. Chairman, that the Board's decision, which plants a timebomb under the agency programs, has been greeted with utter disbelief and astonishment by the foreign carriers and their governments.

It is a fact that U.S. carriers enjoy access to IATA travel agents in countries overseas. This free and open access to overseas travel agents is part of the reciprocal guarantee of fair and equal opportunity to compete which the U.S. Government and foreign governments agree upon when they exchange commercial air rights. It is, frankly, frightening to think what the consequences will be for this open market environment if the IATA/ATC agency programs fail as a result of the Board's decision to deny antitrust immunity.

No doubt it was just such fear that prompted the U.S. Department of State formally to move the CAB to drop its review of the IATA agreements after receiving a number of formal protests by foreign governments. Incredibly, the Board rejected the State Department's motion almost without comment.

Mr. Chairman, the crucial question is whether nonexpert juries and courts shall determine whether the vital airline agency distribution system is consistent with the public interest and this country's international commitments.

The CAB spent 3½ years examining these programs at great public and private expense, but after finding that the agreements and the small agents they sustain are enormously valuable to the public, the Board still refused to take the step necessary to preserve the program.

Instead, the experts, that is to say the CAB—and I use experts in inverted commas—decided to pass the buck to the laymen, to the juries, judges, and antitrust plaintiffs counsel to decide the ultimate shape of the U.S. air transportation distribution system.

Mr. Chairman, on behalf of IATA, I can only say that I fear for the fate of the small travel agents in this country, and, indeed, for U.S. international air transportation when the first lawsuit naming an IATA carrier—particularly a foreign carrier—is filed.

I think it is a tragedy to subject the carriers and their small business agents to such harassment after the CAB has found these programs to be consistent with the public interest. The CAB is expecting too much of carriers to stand by the programs in these circumstances.

As a result, it is likely that they will be abandoned and small agents will suffer the consequences; not willingly, I hasten to add. Those agents, as I have explained to you, are critical to us. But as much as we want and need a vast network of small agents, the international carriers simply cannot afford the administrative costs of anywhere near the level of appointments we currently have in place. We couldn't afford the harassment on the legal consequences which would occur with the lifting of the antitrust immunity.

This inevitably means that thousands upon thousands of travel agencies, small businesses, could lose their international appointments and [illegible] ability to sell a full package of worldwide air services to the American consumer.

Of course, as the international carriers are denied progressively access to the U.S. market, I can only expect that foreign governments will take action overseas to curtail access to their markets by the U.S. [illegible].

That is a consequence which I devoutly hope will never happen, but it is one of the consequences that could happen out of this decision.

Mr. Chairman, I hate to end on such a sad and gloomy note, but I would be wrong not to give this subcommittee my very best predictions no matter how harsh they may be. Through its failure to use the authority you have given it, the CAB has placed in jeopardy a program it has taken 40 years of worldwide cooperation to create.

Sadly, Mr. Chairman, there is nothing to replace this program if it fails.

Thank you for letting me testify here today.

[Mr. Meredith's prepared statement with attachment follow:]

PREPARED STATEMENT OF JOHN D'A. MEREDITH, GENERAL MANAGER, NORTH ATLANTIC DIVISION, BRITISH AIRWAYS, ON BEHALF OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

My name is John D'A. Meredith. I am general manager, North Atlantic Division for British Airways and I am appearing here today on behalf of the International Air Transport Association, of which British Airways is an active member. The International Air Transport Assocation (known as "IATA") is a voluntary organization comprising over 120 of the world's scheduled air carriers representing most countries of the world.

As my colleague, Gabriel Phillips of the Air Transport Association of America has observed, IATA has, during the past four decades, developed through a series of airline agreements standards for the appointment of passenger sales agents within the United States which are quite similar to those employed in the ATC program. By virtue of IATA appointments, over 20,000 U.S. agents are authorized to sell international air transportation on most of the world's air carriers. The IATA program, therefore, largely complements the ATC program in the U.S. which is directed at domestic sales. I should, however, observe one important difference in the two programs. The IATA program is worldwide, and the total number of IATA agents worldwide now exceeds 35,000. Additionally, IATA administers agreements for the selection and retention of cargo agents in the U.S. and throughout the world.

Mr. Chairman, it is especially timely that this Subcommittee is looking into the marketing of air transportation by agents in this country. While tourism and transportation are multi-billion dollar industries, we in the airline business never lose sight of the fact that it is the small businessman—the independent travel agent in offices spread throughout the country—who provides us direct access to the consumer and, in turn, provides the consumer with direct access to the integrated air transportation system. And by that, Mr. Chairman, I refer not simply to the domestic air transportation system, but to the worldwide system of air routes which have developed so extensively in the decades since the Second War. We, in the international air transportation business, appreciate travel agents—in particular, the small agent—most of all. For it is these persons found in every city and village in every state who, by providing us one passenger here and two passengers there, are so vital to filling the large intercontinental aircraft whose efficiencies and comfort we all enjoy.

Recently, as you are aware, the Civil Aeronautics Board (CAB) has concluded a proceeding known as the Competitive Marketing Investigation or the CMI. The consequences of the Board's decision, which looked into the carrier agreements for appointing and retaining agents in this country, are yet to be fully felt. But, speaking for IATA and the international carriers, we have grave concerns that the Board's decision could shortly lead to the destruction of this most valuable and unique distribution system. Put very simply, if the IATA and ATC agency programs are as valuable to the public, the travel agents, and the carriers as the CAB itself found, then the CAB should have provided the antitrust immunity for these undertakings which Congress clearly intended it should do under the Federal Aviation Act. Instead, by denying that immunity and, I submit, the will of Congress, the Board has built a time bomb into the programs in the form of harassing antitrust lawsuits which I fear will destroy them in the end. This will be a great loss for consumers and carriers. Of equal importance, it will almost surely lead to the elimination from the marketplace thousands of small existing travel agencies and the inability of other qualified small entrepreneurs to enter the business.

I recognize, Mr. Chairman, that the Board may not have intentionally undertaken to destroy or discard the IATA and ATC agency programs. But, as a practical matter, the Board's willingness to expose carriers continuing in these programs to antitrust suits by private plaintiffs, regardless of the merits of their contentions, points an arrow at the heart of the international carriers' United States marketing efforts. This is an ominous, threatening gesture which, I must say, has been viewed with both astonishment and disbelief by the international carriers, particularly the foreign carriers and their governments. Moreover, I find it quite incomprehensible that the Board would simultaneously expose the thousands of small agents who are collectively appointed by the world's carriers under these programs to the same form of harassing lawsuits. By denying antitrust immunity to the programs, which it otherwise found benefit the public, the Board has subjected the little agent to defending suits under the antitrust laws for which he has no adequate resources.

Mr. Chairman, I would like now to discuss some of the factors that cause the international carriers to support the IATA agency program in this country as a vital component of the world air transportation system. I will address the airline marketing needs served by the agency program; its consequences for the fair and equal opportunity concept which is the keystone to international aviation relations between governments; its impact on competition, particularly as it affects the small agent; its role in promoting public service; the question of alternatives to the IATA program; and, I submit, the inherently non-restrictive nature of the program with respect to other ways of distributing air transportation tickets. I believe these considerations will demonstrate that the IATA agency agreements and the ATC agreements deserve to be maintained in this country as the backbone of the air transportation distribution system with antitrust immunity as, I submit, Congress intended.

I. INTERNATIONAL AIRLINE MARKETING DEPENDS ON THOUSANDS OF SMALL TRAVEL AGENTS WHO ARE AVAILABLE TO REPRESENT ALL AIRLINES REGARDLESS OF THEIR SIZE OR ROUTE STRUCTURE

The IATA sales agency program satisfies the distribution needs of all participating airlines—large and small—by offering the optimal number and variety of sales outlets required to penetrate the vast United States market. Direct selling alone simply will not suffice. Even large U.S. airlines, with the support of their high volumes of ticket sales on a variety of domestic and international routes, cannot economically cover the nation with their own sales offices. Foreign airlines can develop only a fraction of such sales volumes since they are precluded by law from competing for domestic traffic flows and as a rule are permitted to serve only a few U.S. gateway points on routes to their foreign homelands. There is not the remotest possibility that a foreign airline could achieve the volume of ticket sales that would be necessary to support a network of ticket offices sufficient to provide reasonable market coverage. For foreign airlines direct selling on a large scale is simply not an option.

I can demonstrate this point by referring to my own carrier, British Airways. We are certainly one of the largest foreign airlines in terms of its U.S. sales volume. It is British Airways' policy to maintain its own ticket offices where they are cost effective, but not to do so at a loss simply to "show the flag". In pursuance of this policy British Airways presently maintains only some two dozen sales offices in the entire United States. It maintains street level offices to serve the general public only at online service points—such as Washington, D.C.—where there is a heavy demand for direct sales which can be combined with servicing activities for incoming passengers who need to adjust their travel arrangements. At a number of these locations we share space with another airline to make the sales office cost effective. Our sales offices at offline locations (over half of the total) exists primarily to serve the needs of our agents in these areas.

Through the IATA sales agency program, which encourages the development of multi-business travel agents, we currently are obtaining sales representation at over 20,000 locations throughout the United States. I think it is accurate to say that as a result of this system there is no significant geographical or functional segment of the United States travel market lacking ready access to our services. Our experience is, of course, only representative of that of many other international carriers serving this country.

This is a superlative distribution network both absolutely and in comparison to other industries, many of which are competing with ours for the discretionary income of American consumers. I cannot imagine that there is any other distribution system we could practically adopt that would provide us with the tremendous number and variety of sales outlets of the IATA sales agency program.

It is no exaggeration to say that the very existence of our airline—or many others—in this country in anything like its present form is dependent upon the agency sales representation we receive under the IATA program. About 80 percent of our passenger revenues in the U.S. are produced by IATA agents. This figure is comparable for all the international carriers, both U.S. and foreign.

The comprehensive scope of the IATA agency network in terms of sales locations is therefore vitally important to all IATA carriers, including British Airways. That is not to suggest that all those 20,000 agency locations authorized to sell British Airways transportation are doing so in anything like equal measure. Indeed, some of them may never have sold a British Airways ticket. A few of them, I am happy to say, top a million dollars annual sales for us. However, we are to a very substantial degree dependent upon the collective efforts of thousands of small IATA agents whose individual sales production for British Airways is not great and may only be occasional.

To illustrate this point, a few statistics will help. In our 1981-82 fiscal year 90 percent of U.S. IATA agents produced less than $38,000 in annual sales for British

Airways—the smallest active sales level that our records recognize. However, these thousands of small individual producers collectively accounted for 43 percent of British Airways' total passenger revenue. On some of our routes (e.g., Chicago-London) the proportion is much higher and it is clear that we could not serve the route at all without access to these numerous, small distribution outlets. On other routes the increment of revenue provided by our numerous small agents would spell the difference between operating fuel-efficient wide bodied aircraft or not, or providing an adequate frequency of service to meet the needs of the traveling public. Most certainly this revenue provides the margin of any profit we might earn on any of our routes.

It is perhaps appropriate here to reiterate a point I touched on earlier, which is that the very broad sales coverage of the IATA agency program upon which we depend draws strength from the joint sales agency program of the U.S. domestic carriers administered by the ATC. The two programs are designed to be complementary so as to permit the small travel agent to handle both the very broad range of U.S. domestic air travel and to write international tickets without much added effort. Under this relationship both domestic and international air transportation receive the widest possible sales representation throughout the United States. Individual travel agents benefit from having a broad range of travel to sell and the public enjoys ready access to a tremendous array of travel offerings. The international carriers therefore have a compelling interest in the continued existence of the ATC sales agency network on a compatible basis with that of IATA.

II. THE IATA AGENCY PROGRAM, BY PROTECTING SMALL AGENTS FROM PRESSURE TACTICS, GUARANTEES EQUAL AIRLINE ACCESS TO ALL AGENTS AND THUS FULFILLS U.S. AVIATION COMMITMENTS TO FOREIGN GOVERNMENTS

The IATA agency program—comprised as it is of thousands of small agents—makes a major contribution to achievement of the fair and equal competitive opportunity objective that is central in most intergovernmental aviation agreements. It may seem strange to think of small businesses as having an important significance for foreign relations, but I can assure you that this is the case.

I have already noted that access to markets through the IATA agency system in this country is of great importance to carriers providing international services, particularly to the foreign airlines which do not have extensive networks of sales offices or routes or U.S. gateways through which to generate volumes of sales. For this reason the IATA agency program is invaluable to preserving a fair and equal opportunity to compete among all carriers—large or small—for international traffic. However, its implications for the fair and equal opportunity concept go much deeper than that.

The joint sales agency program of IATA embodies a critically important understanding among IATA carriers to permit each other to enjoy equal access to the commonly-appointed sales agency network. Stated another way, the IATA carriers, by establishing the common agency program, have undertaken not to foreclose each other's access to agency sales outlets. This understanding is important to the competitive opportunities of all carriers, especially international carriers. It is perhaps even more important to the reciprocal competitive opportunities that U.S. airlines enjoy in most foreign countries where some national carriers may have extremely powerful market positions.

Under the IATA agency program, travel agents—and particularly the small businessmen—are not forced to choose between representing some airlines at the expense of not representing others. IATA agents—whether large or small—represent all of the airlines which have appointed them in a manner that is on the whole remarkably faithful to the tradition of serving the best interests of their clients, the American public. Without the restraining influence of the joint agency program one could foresee efforts by some carriers to appoint agents on the condition that they not represent competing carriers. In other words, to force agents—small businesses—into "take-it or leave-it" deals. Among the airlines, the losers in this country if that happened would clearly be the smaller carriers, including many foreign carriers. Even a large foreign carrier like British Airways would find the contest quite unequal if a substantial airline—e.g., with more markets to sell at a given point—pressed travel agents to represent it on a basis which excluded British Airways.

In the absence of the IATA agency program, it is not unlikely that some carriers will be tempted to exploit their market position in certain U.S. markets. In this process, the small agent may have little choice but to give in. By contrast, the IATA agency program guarantees reciprocal access for all carriers to all agency outlets and makes it possible for small agents to resist being "bullied" by larger carriers.

The CAB's decision to deny antitrust immunity to the carriers' agents will, as I have stated, inevitably—and in the long run—threaten to breakdown of the IATA agency system in this country and in other countries at least insofar as access by U.S. carriers is concerned. I find it difficult to imagine that the national carriers of foreign countries would continue to tolerate joint access by U.S. carriers to the IATA agents in their countries if, as a consequence of the Board's decision, reciprocal access is no longer guaranteed by the responsible authorities in the United States. This would not be an act of political retaliation (although that possibility would surely exist) as much as an act of commercial necessity whereby foreign carriers attempted to recoup in their home markets the contraction in revenues they would suffer here. Such developments would represent the very antithesis of the U.S. competition policy, and since U.S. origin traffic no longer predominates in many international routes, would be contrary to even the narrowest conception of U.S. mercantile interests. Ultimately, the consumers in all markets would suffer from diminution of the readily available competitive alternatives—i.e., free choice of flights, carriers and fares—that is the purpose of the fair and equal opportunity policy—and the IATA sales agency program—to promote.

I should add that the State Department was so concerned about the possibility of the CAB disrupting established international aviation relations and air services by its decision, that during the CMI it responded to foreign government complaints by moving the CAB to cease further review of the IATA agency programs in the national interest. The CAB rejected the State Department's motion virtually without comment, something I find quite incomprehensible.

III. THE IATA AND AGENCY PROGRAM PROMOTES COMPETITION

Since I am neither a lawyer nor an economist, I will not debate the competitive merits of the joint sales agency program either in terms of antitrust or market theories. But, Mr. Chairman, I am an airline executive and I can tell you for a fact that the IATA agency program promotes competition in important ways that affect me and my business. If the Congress wants to promote effective competition—and I believe that it does—then it should support this program by removing the time bomb inherent in the CAB's decision to deny antitrust immunity.

I have already mentioned the fact that 20,000 IATA small business sales agency locations are enabling international air transportation to compete successfully against a panoply of tempting alternatives ranging from camping in your fabulous U.S. national park system to the purchase of vacation homes, boats and video tape machines. Our industry has enjoyed a sustained growth rate well above the average in the U.S. economy, especially in the pleasure travel area where we compete head-on for discretionary consumer dollars. The comprehensive agency network created by joint industry appointment has served well to maximize the competitive presence of our industry and each carrier throughout the nation.

The IATA agency program also promotes competition among air carriers. The multiple-appointment system coupled with a strong tradition of professional impartiality among U.S. travel agents serves well to bring worthy competitive offerings to the attention of consumers. In particular, this has promoted effective competition by new carrier entrants lacking established market identification.

I personally observed the pro-competitive benefits of the IATA agency system at work when we inaugurated service on British Airways' new Seattle-London route. We have never before provided service at Seattle on any route and, to say the least, were somewhat concerned as a new carrier taking on an established competitor, about or lack of strong identity in that market. I can assure you that our task was and is being made vastly easier by the fact that we had an established sales agency network in place in the Northwestern U.S. The agents there were professionally familiar with our airline and started out with a thorough knowledge of the forms and procedures to be followed in representing us. It was therefore a manageable task to acquaint them with the schedule, fares and other details of our new service offering. While we are, of course, engaged in general public advertising, we must rely primarily upon the IATA agents—the many small businesses—to bring the competitive merits of our new service to the attention of consumers who are seriously in the market for international air transportation. This is a process we have gone through, successfully, in many other markets and we have every confidence of success in Seattle.

But the joint agency network promotes effective competition by all airlines, not just new entrants. The range and complexity of our fare and service offerings in this industry taxes even the most experienced professionals, let alone the average consumer. Our most significant competitive pricing initiatives are wrapped up in jargon like APEX, Super Apex, GIT, Super Saver, Supreme Super Saver, and Vacances, which is paraded before the American public in a jumble of TV and radio ads which mention "some restrictions" with a caveat to "see your travel agent for details". There are dozens of competitive service variations that have significance for at least some travelers such as three-class service, sleeper seats, lounges, inflight movies, and special terminal facilities, to name a few. These are not widely known among the general public and more than our fare offerings are always understood.

Without a network of professional travel agents to explain personally to individual consumers on a fair comparative basis the price and service options that have relevance to their particular circumstances, airlines risk failure of many of their best competitive initiatives for simple lack of consumer awareness and understanding of them. We would be somewhat like the American food packager who perfected a new technique for packaging frozen croissants without spoiling their delicate texture or flavor. Test marketing revealed that the average American consumer found the new product to be delicious when tasted but did not know what croissants were when seeing the package in a grocer's freezer. According to a press report, this lack of consumer recognition caused the demise of an obvious superior product.

The IATA agency program as it now exists in the United States also promotes a degree of competition at the travel agency level itself that would disappear without the program. Under the IATA program the air transportation industry is almost entirely free of the most common restriction in other market distribution systems: the demands of retail sellers for exclusive sales territories or for quotas on the number of sellers. Entry into the travel agency field as an IATA accredited agent is available to all who satisfy a few, straightforward standards. There are no quotas or limits on the number of IATA agents who can be appointed. Most applicants are accepted and very few ever fail in business because the standards make sure they are qualified. And each agent—no matter how small—has the opportunity to sell transportation over the lines of carriers from all over the world.

In the absence of the joint IATA program, large, established agents would be free to bargain with airlines for exclusive appointments in various areas. Thus, for example, the largest and most influential travel agent in a particular town might demand to be the exclusive British Airways agent in that town as a condition of representing British Airways at all. Notwithstanding the many very small agency locations, there are agents who are important enough in particular markets to demand and get the kind of consideration which restricts the airline's distribution network and the choices available to consumers. The IATA program prevents this activity which would be most harmful to the smaller agents.

IV. THROUGH THE IATA/ATC AGENCY PROGRAMS, EACH SMALL BUSINESS TRAVEL AGENCY MAKES AN IMPORTANT PUBLIC SERVICE CONTRIBUTION

The IATA/ATC agency programs make important contributions to the ability of the air transportation system to serve public needs.

In the first place, these programs provide the only known framework for the joint designation of sales agents airlines involved in providing interline air transportation. That is certainly a major public need if British Airways' experience is a guide. About 40 percent of our total passenger traffic involves through transportation on two or more airlines. At least 60 percent involves some form of interline transaction with another carrier requiring our recognition and acceptance of a standard travel document issued by an IATA agent.

The IATA/ATC agency programs also provide reasonable assurance—indeed the only real assurance the public has—that persons calling themselves travel agents to whom consumers are entrusting their money and their travel plans are in fact financially and professionally qualified to act in that capacity. I submit that on this ground alone there is a compelling public interest in maintaining these programs, and I believe it is significant that in the CMI, not a single consumer group opposed in any way these agency programs. The very high level of consumer satisfaction with IATA/ATC agents is also a matter of record in that case.

The growth and development of the air transportation business depends to a large extent upon a continued high level of public confidence in the reliability and integrity of travel agents. British Airways is, of course, greatly concerned that the agents accredited to represent it are publicly regarded as experienced and capable of giving high quality service. However, British Airways also has a direct business interest in the quality of the travel agents representing all airlines, including its competitors. Anyone familiar with the history of charter air transportation in the United States is aware how the reputation of an entire industry can be tarnished, and its sales revenues depressed, by the irresponsible or dishonest actions of a relative few.

The IATA/ATC agency programs provide the basis for developing standard industrywide forms and procedures for such things as reporting and remitting by agents. Apart from fostering interline transactions, this promotes efficiency in the air transportation industry, avoiding the sheer economic waste of procedures that are duplicative as well as incompatible with the complex tasks involved.

V. THE IATA AGENCY PROGRAM, DEDICATED TO MAINTAINING EASY ENTRY INTO THE AGENCY BUSINESS FOR THE SMALL BUSINESSMAN, HAS CREATED A UNIQUE, RELIABLE AND COMPETITIVE DISTRIBUTION SYSTEM THROUGHOUT THE COUNTRY FOR WHICH THERE IS NO COMPARABLE SUBSTITUTE

It is significant that the CAB, in its CMI decision, did not identify any alternative to the IATA/ATC agency programs. Instead, as I have said, they simply have sidestepped this whole issue. I suggest that the reason for this is pretty clear—the IATA/ATC programs are totally unique, as are all the benefits these programs provide.

The IATA/ATC joint agency system is simply the most economical and effective way to accomplish the widespread sale of fairly expensive, rather complex service contracts for transportation (i.e., airline tickets), along and in conjunction with other travel related services. I should note that the hotels, rental car companies, steamships, buses, and so forth are more than happy to rely on the competence and public acceptability of our IATA/ATC agents.

If the IATA agency program fails because of the Board's decision in the CMI, it seems quite clear that most airlines, including British Airways, would not have any realistic alternative of going it alone. British Airways could not afford on the strength of its own limited volume of U.S. ticket sales to administer an agency program encompassing anything like IATA's 20,000 agency locations, most of which are producing very little revenue for it on an individual basis. Yet, as I have demonstrated, British Airways requires representation by this large number of small agents in diverse locations to sustain its U.S. operations. Thus, we would be forced to try to find some entity that could be substituted for IATA in the role of administering a large sales agency network.

There is no organization that could readily undertake IATA's agency administration function. As a consequence, major U.S. airlines would be likely candidates to assemble agency networks which they would use themselves and, as general agents, provide to foreign airlines. I see nothing to recommend such arrangements over the present IATA/ATC system from the standpoint of the public, the airlines or the agents. Lacking the extremely broad base of collective appointments that the present system has, such Balkanized agency networks could never hope to equal the comprehensive sales coverage now provided to the airlines and the public. Nor could they provide the small business agents with as wide an inventory of air transportation offerings as at present. They would impair if not destroy interline opportunities for most American travelers. And they would lack the commercial neutrality that characterizes the IATA/ATC agency administrations.

It has sometimes been suggested that the U.S. Government could provide a substitute for some of the important IATA/ATC agency administration functions through a program of travel agency licensing. However, there is no purpose in debating here the merits of Government licensing of agents versus the present conference appointment system since there is not the slightest indication that a comprehensive Government licensing scheme will be adopted.

VI. CONCLUSION

I have described the IATA agency program as the heart of the international carriers' U.S. marketing efforts. However, I would like to conclude this statement with the observation that it is not a restrictive program from the standpoint of airline marketing. It does not preclude direct selling by participating airlines. British Airways, for example, engages in direct selling wherever that is commercially advantageous. In addition to maintaining public ticket offices in major cities, we have sales representatives who deal directly with various commercial and group travel accounts.

And the IATA agency program most certainly is not a barrier to experimentation with novel distribution techniques. For example, before the CMI even began, British Airways approached Ticketron as a possibly efficient way to distribute its point-to-point standby tickets. It happens that we judged Ticketron's computer system to be incompatible with our needs. But IATA's membership has never been thought to prohibit us from exploring such distribution options. I find it quite remarkable that the CAB, in its zeal to characterize the agency program as unduly restrictive, summarily dismissed this factual evidence, apparently because it totally contradicted the Board's preconceived view of how the programs operated.

BIOGRAPHICAL SKETCH OF JOHN D'A. MEREDITH, GENERAL MANAGER, NORTH ATLANTIC DIVISION, BRITISH AIRWAYS

John Meredith has been employed by British Airways and its predecessor, BOAC, since 1958 in a variety of positions that have acquainted him with virtually every aspect of the airline. As a management trainee he received three years of training experience in all areas of commercial operations, ranging from traffic handling, flight handling, MET forecasting, and operational control, to reservations, sales and marketing. Thereafter, he worked overseas in about 20 countries all over the world, sometimes working at airports, sometimes on the sales side. He returned to London as Personal Assistant to the Commercial Director of BOAC and then attended the Harvard Business School for the Program in Management Development. His experience since then has included serving as Deputy Marketing Manager in the United States, Manager for the Eastern USA Region based in Washington, Assistant General Manager of the airline's Southern Division based in London, and Manager USA with general management responsibility for all British Airways activities in the United States, including marketing and relations with travel agents.

In his current position of General Manager, North Atlantic Division, Mr. Meredith is based in London and is responsible for all British Airways operations on the North Atlantic and for the profitability of these routes. Mr. Meredith's background has given him experience with the marketing of air transportation in various forms throughout the world, and he has dealt with travel agents all over the world. He has a broad appreciation of the workings of the international air transportation distribution system and of the realistic possibilities for changing it.

Mr. LUKEN. Mr. Meredith, I think you have put it very well; a strong statement, and I might say "amen," rather than indulge in too many questions.

I have just one, I believe, and it has already been touched upon by both of you gentlemen. It seems that carriers expressing typical American business caution when dealing with antitrust matters might be leery of meeting with regard to conference programs if immunity actually expires.

Would you agree with that?

Mr. MEREDITH. Yes, Mr. Chairman.

Mr. LUKEN. Do you have any comment either way?

Mr. MEREDITH. We are very concerned about this matter. I have worked, as you can see from the record, in the United States. I was the manager in the United States for British Airways for 3 years and I have worked previously here.

I even went to the Harvard Business School, so I have a partial American education. I have to tell you that my experience with the legal situation is such that we will be very concerned. The number of court cases we had to deal with when I was in the United States on just minor matters is vast compared to a lot of other countries in the world. If we did not have antitrust immunity, I think we would be deluged with lawsuits that will be very expensive.

As you know, the antitrust laws have very specific and expensive penalties. You, therefore, have to spend a lot of money to employ very expensive lawyers to protect yourself. We might win some of the cases. We might lose. I don't know. But the harassment involved in that situation is intolerable. I don't think this should happen if we are operating a system which is applying standards, which one Congressman pointed out are not too unusual in the service industry.

I don't think we should be subject to that harassment. I think that that is unreasonable.

Mr. PHILLIPS. I may add to that, Mr. Chairman. Indeed, the airlines would simply not meet under those circumstances. We have had over the years a much more comprehensive scheme of airline rules under the more heavily regulated environment of the past, whereas you have heard, we regulated commissions and other things of agents.

When the CAB disapproved that provision of our agreements, in all subsequent meetings we have had of the airline industry and the agents to discuss the agency program, we have been extremely careful to avoid any kind of reference to commissions.

If they do away with any ability to hold reasonable standards on appointments, what are we going to meet about? They just won't take the risk.

Mr. LUKEN. I have no further questions except that I want to make sure that you gentlemen heard Mr. McKinnon's comments this morning. Is there anything that you wish to comment on that you didn't have in your prepared text in reference to that testimony?

Mr. PHILLIPS. Mr. Chairman, there are two things I would comment on. One has to do with the fact that the ATC program, as such, that the Board passed judgment on and made some changes, practically has no restraints on the marketing of air transportation. That is purely a function between agents and airlines, what price they will charge, what commission they will pay, whatever innovation an agent wants to undertake today, it may do so.

The ATC program just simply provides rules for the appointment of travel agents and for the collection of their revenues and the settlement among them. The marketing of air transportation, to be sure with the help of the CAB over the last 2 years, has become deregulated. The Board's decision in this case really did nothing more to that except throw some confusion in the air.

Second, the Chairman made some reference, and I think he really sincerely believes this, that the travel agency community is a protected animal. It simply is not a protected animal when 2,000 new agents come into the business every year. There are failures in the travel agency business.

Last year we had 258 agents who involuntarily went into default leaving the airlines with some $12 million in uncollected receivables. They do face the same risks of other businesses. They have to be good managers in order to stay in business. They are simply not protected.

I think that that would be a misleading impression to say that they are a protected industry.

Mr. LUKEN. You could characterize them as a self-regulated industry.

Mr. PHILLIPS. They aren't self-regulated because they don't have any established means of qualifications within the organization. To be sure, the trade associations in the travel agency industry themselves try to establish qualifications for membership which on the fringe is a form of self-regulation, but without an ATC or an IATA appointment mechanism today, there is no mechanism for self-regulation like you have in the securities industry or in the——

Mr. LUKEN. The accreditation itself is a form of self-regulation.

Mr. PHILLIPS. In a sense, it is.

Mr. LUKEN. It is not industrywide. It has its own particular characteristics, as most industries do.

Mr. PHILLIPS. That is right. They do that.

Mr. LUKEN. What we usually try to achieve in this Congress is that kind of self-regulation. Certainly it is not a regulation imposed by the CAB or of any agency that I have heard.

Mr. PHILLIPS. These are industry rules established by the airlines and the agents working in concert to govern their respective relationships with each other. They are not Government regulations.

Mr. LUKEN. That sounds like self-regulation.

Mr. PHILLIPS. It is clearly self-regulation. But it needs some protection from the behavior of the antitrust laws.

Mr. MEREDITH. Mr. Chairman, I have made most of my comments on Chairman McKinnon's speech. I was going to add what Gabe Phillips said, there is nothing in the agency program which protects an agent from bankruptcy, and I have to sign some of the writeoffs when they go bankrupt. The implication that somehow antitrust immunity and the ATC program protects an agent from bankruptcy is absurd, utterly absurd.

The second point, I saw in the chairman's testimony, he said the airlines will also benefit. That is an absolute load of nonsense.

No airline that I have heard has said he is going to benefit. There may be some. I don't know. But the vast majority of airlines said they will not benefit. The evidence that I have submitted to you here today indicates precisely why we think so. That statement is not supported by any concrete facts, whatsoever. That is the only point I want to make, Mr. Chairman.

Mr. LUKEN. Thank you. I have no further questions. The gentleman from Minnesota?

Mr. WEBER. Thank you, Mr. Chairman.

Mr. Phillips, I would just like to pursue a little bit further the question of competition in the travel agent industry. You talked about the number of people that come into the business every year.

Would you, also, discuss a little bit for us the number of people that are denied accreditation and why they might be denied accreditation.

Mr. PHILLIPS. Currently, our experience, Mr. Weber, is that about 5 percent of serious applicants are denied. In other words, last year we had about 2,000 new agents appointed, and we had about 100 who were denied because they couldn't meet one or more of the criteria, either a manager who was experienced with 2 years of experience, or a bond requirement, or was not open to the public, or one of the key features of the program.

But a relatively small amount of applicants are turned down.

Mr. WEBER. So it is accurate to say that there is really no problem with entry into the business?

Mr. PHILLIPS. It is virtually free entry.

Mr. WEBER. I see. It seems to me that the customers we need to be concerned about here, the customers that could be most adversely impacted by any change we make are the occasional travelers, is not the traveler that flies often enough so that he or she may be as familiar with the system and be able to look out for their own interests, but the person who travels relatively infrequently, maybe vacation travelers, people who save money for a long period of time and decide to go on vacation.

It seems to me that we have a special obligation to consider how the system protects people like that. Could you describe for me how the existing system protects that flyer and what protections might exist or not exist under the changes recommended by CAB?

Mr. PHILLIPS. All right. The present system where an agent is automatically appointed by all airlines in the ATC, unless an airline specifically doesn't want to appoint that—as a rule, when an agent is appointed, it represents all airlines—the airlines, members of ATC, have interline agreements within the ATC community and with other airlines, like the IATA airlines, so that an agent representing, say, Eastern or United or American or any airline automatically can write a ticket in conjunction with that carrier and any other carrier, such as British Airways.

Directly unrelated to the program, but, in part, because of it, tickets are transferable. They are refundable. I mean, transferable between airlines so that if a passenger went from Washington to San Francisco on one airline, and had a booking to return and wanted to change that, that passenger could do so relatively easily.

The concern about what the CAB seems to be wanting to do in creating new marketing opportunities really is that—and in allowing something called an online agent to develop over the next 2 years of the program, is to have a special relationship between an airline and an agent that is tied to that airline, and in so doing, that flexibility of being able to switch your booking from one airline to another will be lost because that agent will not necessarily be the agent of a second airline.

So it is in that case where the traveling public is so used to this flexibility, when they go to use a travel agent, they know that they can change their travel plans and without any problem.

But if these online relationships develop significantly in the marketplace, there will be confusion in the traveling public, and it is going to take some while for them to learn how to adjust to that.

Mr. WEBER. In essence, it seems that if the changes go through, the burden really will shift to the consumer much more to look out for himself, in essence, by shopping around among travel agents. Whereas, presently, the burden of protecting that consumer is on the travel agent.

In that context, the consumer would certainly not benefit from this competition.

Mr. PHILLIPS. Well, one of the virtues of the travel agency program for today's consumer, particularly in this deregulated environment where air fares are widely different and changing all the time, it is impossible for the average traveler to search out the most reasonable fare for the service they want.

The travel agent is uniquely equipped to do that for them. But once the travel agent is tied to a particular airline for a special fare arrangement, if that is what the consumer is going to have to face, he is going to have to do his own shopping around, instead of relying on the travel agent.

Mr. WEBER. What percentage of travelers in this country would fall into this general category of the occasional traveler?

Mr. **Phillips**. We have taken surveys of this. I don't have the figures precisely in my head, but I can supply them for the committee. These were Gallup surveys attached to their regular questionnaires that say about 55 or 60 percent of all Americans have flown, about 40 percent of them comprise most of the airline trips in a given year so that——

Mr. **Weber**. Rather a large percentage of the American people, then, that travel occasionally, not often, but occasionally.

Mr. **Phillips**. That is right.

Mr. **Weber**. I think that that is significant.

My time is running out here. I just want to make one point for the record, Mr. Meredith.

I tried to get this point from the CAB Chairman, but as I understand it, the concerns that you have expressed were expressed to the CAB by our State Department.

Mr. **Meredith**. Most certainly.

Mr. **Weber**. Would you characterize, again, for the record the response of the CAB to our State Department's recommendation?

Mr. **Meredith**. Well, my impression of their response is they ignored it, Congressman. I think the chairman said something about they took it into consideration. That is what I call a "rhubarb-rhubarb" phrase. It doesn't mean anything; not to me, anyway. Certainly the record of what they decided indicates that they ignored it.

Mr. **Weber**. Thank you. I have no further questions, Mr. Chairman.

Mr. **McCloskey** [presiding]. Thank you, Mr. Weber. I would like to commend both of you gentlemen for a very forthright and clear testimony.

Perhaps one last question. Particularly Mr. Meredith used very forceful language, the term "destroy" as to the basic, present industry and arrangements.

Could either or both of you comment from a crystal ball aspect, perhaps, as to what the marketing structure would look like in 10 years and what are the possible impacts on consumer prices, because, I guess, all proponents in this say their main desire is to serve the consumer.

Mr. **Meredith**. If I could just answer internationally. There are slight, certain differences domestically and internationally. But internationally, if this decision went ahead, my belief is that you would get severe fragmentation in the industry; there is the online agent, the concept the CAB produced, which, incidentally, was never produced in the evidence before the CMI hearing. It was produced by the Board at the end and it was never discussed.

But the online agent might well become a dealer. There will be airlines that will be tempted to say, right, we will get that agent just to sell us.

They will try to seal up large chunks of the country just for them. The consumer, therefore, wouldn't have a free choice. He would only be able to get that particular agent.

Remember, if that airline had the vast majority of services in a certain area, he would have great ability to put pressure on. No foreign airline could compete with that.

We have no right to operate on domestic services. The net result of that would be that the foreign governments and airlines would have to retaliate in their own countries. Instead of having an international, global system of transportation that serves the interest of the public, you would have a fragmented, biased system which would not be in the interest of the public at all.

Mr. McCloskey. Thank you, Mr. Meredith.

Mr. Phillips. I would just add to that that the agency community is an instrumental arm of the airline marketing effort, and no matter what happens, there will be agents, and they will continue to sell a substantial portion of the airline tickets, but it will be different.

There will be special relationships which will make it more difficult to maintain the interline system that people have learned to use, the interchangeability, the ability to use agents with confidence that they represent impartially all the airlines, and in that sense, I think the consumer will be much worse off.

Mr. McCloskey. Do you see a monopoly trend possibly developing with larger, more corporately sophisticated enterprises easing out the small or medium size?

Mr. Phillips. Certainly, with respect to business travel, which is becoming, as the chairman even recognized, a substantial portion of the agency business, you will see more concentration. The inducements will be there for encouraging bargaining power, and that sort of thing.

The little agents or the agents who have small volumes who are in remote or suburban communities will be all right, but the concentration is going to occur in the commercial side of the business, as I see it.

Mr. McCloskey. Thank you, Mr. Phillips.

Mr. Bilirakis?

Mr. Bilirakis. Just one question which may break down into a series of two or three.

Mr. Phillips and Mr. Meredith, you are here representing ATC and IATA; is that correct?

Mr. Meredith. That is correct.

Mr. Phillips. Yes.

Mr. Bilirakis. Basically, then, your testimony is the testimony of all member carriers of ATC and IATA?

Mr. Phillips. That is correct.

Mr. Meredith. That is correct.

Mr. Bilirakis. Do you know of any carriers who might look favorably upon the CAB's decision?

Mr. Meredith. No. Not internationally.

Mr. Bilirakis. Not internationally? How about domestically?

Mr. Phillips. Nor domestically. The ATA member airlines have taken a position that is on the record that supports a congressional effort to replace the CAB's decision with that of the administrative law judge's. That decision is the unanimous policy of the ATA member airlines.

Mr. Meredith. Could I make a further point? Freddie Laker, who was never regarded as a great friend of IATA, used the travel agency system in the United States to distribute his product. He regarded it as the best system to use.

Mr. Bilirakis. So basically what we are saying is from the viewpoint of the carriers, they would like to see the status quo retained because it works.

Mr. Meredith. We believe it works for the consumer, the airlines, and for the agents, and that is a good combination.

Mr. Bilirakis. Thank you.

Mr. McCloskey. Thank you, Mr. Bilirakis.

I would like to thank both you gentlemen for your testimony today. It was very enlightening and very much appreciated. Thank you.

I think now we will have a witness with perhaps a different point of view, Ms. Arlene Macchia of the National Passenger Traffic Association. Good to see you, Ms. Macchia. Please feel free to proceed with your formal statement or however you would like to elaborate on it.

TESTIMONY OF ARLENE D. MACCHIA, PRESIDENT, NATIONAL PASSENGER TRAFFIC ASSOCIATION; ACCOMPANIED BY JOHN BACON, VICE PRESIDENT; SANDRA KATZ, COUNSEL; AND PAT McGINNIS, CONSULTANT, NPTA

Ms. Macchia. Fine. Good morning. I am honored to have the opportunity to appear before you to discuss the competitive marketing of airline tickets. I have with me today a member of the NPTA, John Bacon from Tenneco Inc. in Houston, Tex.; Sandra Katz, our counsel; and Pat McGinnis, consultant.

As president of the National Passenger Traffic Association, I want to express our strong opposition to H.R. 2053, a bill recently introduced in the House of Representatives which would prohibit competition in the sale of airline tickets for a commission and provide permanent antitrust immunity to travel agents.

We are delighted that this subcommittee, which deals with antitrust and restraint of trade, is taking the time to consider the merits of competitive marketing in this area. I have a longer prepared statement which has been submitted for the record.

NPTA is an association of the in-house business travel departments, more commonly known as BTD's, of more than 600 corporations, hospitals, educational institutions, and government agencies. NPTA also has 20 regional affiliates that have another 850 organizations as members. Since business travelers are responsible for more than $19 billion in business travel annually, more than half of all air travel, we are naturally interested in promoting the most efficient and responsive system of marketing airline tickets.

As an advocate of competition in this area, we have been involved with the CAB competitive marketing investigation since its inception.

As Chairman McKinnon has described, the Civil Aeronautics Board issued a very important decision in December 1982, which would break up the travel agents' monopoly and end their exclusive right to distribute airline tickets for commission.

Some of the specific elements of the Board's decision are worth repeating. Among other things, the Board found that the public interest would best be served if the marketing of tickets operated in a competitive environment subject to the antitrust laws rather than the detailed and costly oversight of the CAB or its successor; that air carriers ought to have the freedom to take advantage of other marketing options to distribute their tickets; that the current provisions which prevent business travel departments from becoming accredited agents have unreasonably restrained competition and should be eliminated by 1985; that the basic framework of the existing travel accreditation rules, including standards relating to financial security and competence, should be approved very much as it now exists; and that the carrier conference, the agents, and the potential new sales intermediaries may need time to adjust to the competitive market, so the CAB provided for a generous 2-year transaction period.

Mr. Chairman, H.R. 2053 does not serve the interest of the traveling public. It protects travel agents from competition and harms the public by denying them the benefits of a competitive marketing environment. In the long run, all of us will pay a price for this.

To begin with, exclusivity and antitrust immunity have eliminated any incentive for agents to compete on prices, which would mean accepting lower commissions from the airlines. In fact, since 1978, agent sales commissions have risen steadily from 7 percent to nearly 10 percent today.

These increases have been disproportionately high compared to other operating costs of air carriers. Commissions have more than doubled from 2.8 percent of airline operating expenses in 1970 to 6.2 percent in 1982.

Between 1981 and 1982, alone, the total commissions paid out by the airlines jumped almost 9 percent from $1.95 billion to more than $2.2 billion while overall operating costs increased a little over 1 percent.

Since this upward spiral of commission payments is obviously costing the airlines and consumers, one obvious question is why have airlines not acted to reduce commission levels? Why are air carriers not offering corporate customers and other frequent flyers bulk discounts as the CAB said they could in 1981?

The reason is simple. Air carriers fear travel agent reprisal. Although most carriers will not discuss it publicly, travel agents, by virtue of their market dominance, have the ability to sway them from taking actions adverse to the interests of the agents.

The most common practice is to plate away from carriers who step out of line. Let me give you some examples.

In February 1980, the CAB withdrew the 7 percent fixed commission and ordered airlines to make individual plans to compensate agents. United Airlines was the first to respond coming in with a proposal to pay a flat $8.50 per ticket transaction. But that proposal generated so much opposition among agents that United quickly withdrew it and replaced it with a sliding scale of payment ranging from $7.50 to $37.50, depending on the distance flown. Despite its policy reversal, United was not left unscathed. In March, the airline showed a 14-percent drop in traffic. At that time, Newsweek magazine reported one San Francisco agent saying that she redirected 30 percent of her United business to other airlines.

A travel agency president in Florida wrote an editorial in Travel Trade News Edition, which warned:

If United does not revise its $8.50 per coupon fee, I will not sell any United ticket or any tour using United as the carrier. I am prepared to return the United plate if the airline does not maintain its present commission percentage policy.

Similar reprisals have also been experienced by airlines which attempted to lower their commission rate. Last year Frontier Airline attempted to lower its commission from 10 to 9 percent. It was plated away from so badly that it quickly was forced to return its commission to the original level.

The number of travel agents in the United States has grown from only 6,700 in 1970 to almost 20,000 in 1981. Their annual dollar volume for all services grew in the same period from $5 billion to over $31 billion.

Perhaps more telling is the fact that at the time of deregulation in 1978, only 38 percent of domestic air travel was being handled by agents. That figure has now risen to 60 percent in the domestic market and nearly 80 percent in the international market. The bill would prevent new and more efficient distribution systems and discourage retailers who might offer lower commissions and limited services. Although Judge Yoder allowed a special exception for Ticketron, his decision prohibited air carriers from appointing business travel departments, banks, credit card companies, or other firms yet to be identified to distribute their tickets. Not only does this deny the public a choice from an array of qualified retailers, but it forces airlines to pay full service commissions to agents regardless of the nature or level of the service they provide.

Airlines are forced to pay the same 10 percent commission on every transaction regardless of whether it is a ticket to London, England, or New London, Conn.

I can imagine a situation similar to that which occurred in the securities industry following the deregulation in 1975. Discount brokerage houses sprung up offering to handle simple transactions for those customers who knew exactly which stocks they wanted to buy.

In some cases, commissions on these services are now about half of what they were prior to deregulation. Unfortunately, as long as the travel agent monopoly exists, there are no incentives for the development of such alternative distribution modes for airline tickets.

Before I address some of the arguments made by proponents of H.R. 2053, I would like to talk for a minute about business travel departments. Businesses, including many small businesses, and others who engage in business travel have basically three options in deciding how to manage their travel: The in-house option where an organization does all its own travel and probably deals directly with the airlines; the in-plant option where the organization conducts its own business travel in partnership with an independent travel agency; and the full service option where the organization contracts all its work out to a travel agency.

In each case, the compensation is different. With the completely in-house method, the BTD does all the work, obviating the need for a travel agent, but it receives no compensation from the airlines.

In the in-plant situation, travel agents receive about a 3-percent commission from the airlines of which a negotiated amount, usually about 2 percent, is passed on to the BTD.

The in-plant travel agency receives the remaining 1 percent primarily for allowing the BTD to use its plate. Usually, the operation is run entirely by the BTD with the in-plant agency doing little or no work.

Under a full service arrangement, a travel agency receives the full 10 percent commission on the organization's business. The company receives nothing.

Most BTD's provide a service remarkably similar to that which travel agents provide. In fact, they are at least as well equipped, perhaps better equipped, in several respects to fulfill the distribution and sales function for the business traveler.

First, most BTD's currently have the same professional competence and capabilities as travel agents, including computerized equipment, ticket stock, interlining authority, training, and good relationship with the airlines.

Second, unlike travel agents, BTD's have a clear motivation to identify the best air travel arrangements at the lowest cost. Their recommendations would not be influenced by the special benefits, such as higher commissions, free trips now offered to individual travel agents.

Third, where in-plants are used, BTD's receive up to 3 percent commission by handling all of the organizations business travel, using an agent's plate, becoming, in effect, an extension of the travel agency. I might add that this is a system which was approved by the airlines. Clearly, air carriers have recognized the competence of in-plant business travel departments.

Let me now turn the committee's attention to the arguments of those who would reject the CAB decision. It is unfortunate that public discussion of the Board's decision has been clouded by a number of unsubstantiated and overstated charges suggesting in various ways that competition in marketing will lead to the wholesale collapse of the air transportation system as we know it, and that as a result, consumers, airlines, and of course, travel agents will suffer. These are false, and I would like to take a few minutes to tell you why. To begin with, if we were to believe that the efficiency of air transportation would be underminded, NPTA would not be opposing H.R. 2053.

Business travelers rely more than any other single group on efficient and dependable air transportation. If the system were to fall apart tomorrow, become more costly or less efficient, we would be the ones to suffer the most. We obviously don't believe this will happen. The CAB did not believe it would happen either.

It has been stated that competition in ticket distribution will drive hundreds of travel agents out of business. There is no basis, in fact, for this claim. Travel agents provide a valuable service to airlines, to discretionary travelers, and to the majority of the business community. As long as agents serve as conscientious representatives of the airline principles and provide competent advice to their clients, airlines would have no reason to alter their marketing strategy.

Other data also belies the claims that agents will be put out of business. In fact, revenue losses from travel agents due to the participation of BTD's or other nonconference marketers are likely to be minimal. To begin with, any impact on the market is likely to be on the largest agencies. In 1978, 18 percent of travel agents that handled corporate accounts dealt exclusively with large corporations. The vast majority, 72 percent, dealt primarily with medium and small corporations who probably would not have BTD's because it would not be cost effective.

Moreover, the larger agencies tend to deal predominantly with larger clients. Given the cost of operating a BTD, even with some compensation, accreditation is likely to be attractive only to the larger users of air transportation. Thus, the agencies which are small businesses, and which this subcommittee is most concerned about, probably will not be affected.

Predictions on revenue shifts also dispel the notion that BTD's will undermine the business of travel agents. The American Society of Travel Agents' own economic testimony before the CAB estimated that BTD-handled sales would increase by only $250 million over what they already handle.

As a fraction of all $19 billion in business travel, that represents only about a 1.3-percent shift. And it assumes that all the lost business would come from sales previously made by agents.

In any case, the bulk of the business is more likely to come from the largest agencies. Hence, the assertion that small travel agencies will be displaced by BTD's is factually unfounded.

Even taking into account the impact of all potential new distributors, ASTA predicted that travel agents total market share would only drop from 53 percent to 51 percent, a 2-percent drop in agency sales.

Some proponents of exclusivity have taken the position that airlines will abandon the common accreditation system and other arrangements in which they now participate. On the one hand they argue that these arrangements are both efficient and desirable to airlines, agents and consumers.

But at the same time they suggest that the system is so fragile that it will surely collapse with the introduction of competition and that air carriers will be willing to abandon them. This is sheer folly. Air carriers have every incentive to maintain high standards. Ticket distribution is vital to their business. Common accreditation is also a more cost efficient means of marketing their tickets. They have every reason to continue to participate.

It has also been suggested that under competition, carriers would abandon their practice of using interline agreements for travel involving more than one airline, thereby forcing travelers into the grim task of carrying their luggage from one airline to another.

Interline agreements permit one airline to write air transportation on other airlines that are parties to the agreement. When one carrier writes a ticket involving another, the first carrier is responsible for any loss. The CAB found that exclusivity is not necessary for interline agreements to continue. Therefore, carriers would certainly continue to make such cooperative arrangements in a competitive environment. Opponents of the CAB decision have also suggested that airline tickets will be sold by persons who will not know what they are doing, such as gas station attendants, bartenders, or the "butcher, baker and candlestick makers." There is absolutely no reason why airlines would ever allow this. Ticket stock is like a blank check. It would be foolhardy to hand it over to an incompetent person.

Airlines have a legal responsibility to provide air transportation or refund the ticket. As I explained, carriers are financially responsible for any tickets that are written which connect to another carrier. If nothing else, an airline can ill afford to have its customers suffer inconvenience or loss at the hands of incompetent ticket persons. Airlines will certainly insist on high standards even for its nonconference marketers.

Finally, to further muddle the question of whether airlines should be permitted to appoint nonconference marketers, it has been suggested that BTD's are really purchasers of air transportation and, therefore, should not be compensated by the airlines. I should note here that travel agents and airlines have already recognized, through the use of in-plants, that BTD's are in effect the functional equivalent of travel agents. They interact with airline computers.

They have their own ticket stock and have been writing tickets. They interline. They even receive a small commission. From the perspective of the airline, BTD's offer the same sales and distribution function as a travel agent. The only difference is that the travel agent makes 10 percent commission on every ticket sold.

There is no legal prohibition of a firm making profits on sales to itself. In fact, it is a well accepted economic principle in other sectors of our economy. In the context of air freight transportation, the CAB approved the airline practice of compensating individuals not affiliated with the carrier for preparing cargo for shipment. This was true even where the user and the preparing agent were one in the same entity.

In conclusion, Mr. Chairman, this bill which is barely two pages long has enormous implications for the airline ticket marketing system in this country. It turns back the clock on everything the CAB has done to carry out the mandate of Congress to deregulate the airline industry.

The CAB said that the time has come to break the travel agent monopoly and give the airlines the freedom to market airline tickets as they see fit. The evidence on the record supports this decision.

H.R. 2053 says, no, we should not only give travel agents back their monopoly, but we should make it permanent.

The National Passenger Traffic Association urges the Congress to reject H.R. 2053, which would reverse the CAB decision and deny the public the benefits of competition. Let us allow the free market to work so that customers and airlines can obtain the best value at the lowest cost.

[Ms. Macchia's prepared statement follows:]

PREPARED STATEMENT OF ARLENE D. MACCHIA, PRESIDENT, NATIONAL PASSENGER TRAFFIC ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am honored to have the opportunity to appear before you to discuss the competitive marketing of airline tickets. As President of the National Passenger Traffic Association (NPTA), I want to express our strong opposition to H.R. 2053, a bill recently introduced in the House of Representatives which would prohibit competition in the sale of airline tickets for a commission and provide permanent antitrust immunity to travel agents. We are delighted that this subcommittee, which deals with antitrust and restraint of trade, is taking the time to consider the merits of competitive marketing in this area.

Before delving into the competitive marketing investigation recently completed by the Civil Aeronautics Board (CAB), let me first provide you with some information about NPTA.

NPTA is an association of the in-house business travel departments, more commonly known as BTD's, of more than 600 corporations, hospitals, educational institutions and government agencies. NPTA also has 20 regional affiliates that have another 850 organizations as members.

Since business travelers are responsible for more than $19 billion in business travel annually—more than half of all air travel—we are naturally interested in promoting the most efficient and responsive system of marketing airline tickets. As an advocate of competition in this area, we have been involved with the CAB's competitive marketing investigation since its inception.

THE CAB DECISION: THE END OF A MONOPOLY

As Chairman McKinnon has described, the Civil Aeronautics Board (CAB) issued a very important decision in December 1982 which would break up the travel agents monopoly and end their exclusive right to distribute airline tickets for commission. This decision will open up the distribution of airline tickets to competition from business travel departments and other organizations. We believe the decision, which will be fully effective on December 31, 1984, will make possible innovations and economies in the distribution of airline tickets that are now foreclosed.

The thrust of the Board's decision flows directly from the mandate of Congress in the Airline Deregulation Act of 1978 that maximum reliance should be placed on competitive market forces to foster an efficient and well managed air carrier system. As a part of that mandate the CAB scrutinized the structure of airline ticket marketing and found that the exclusivity provisions which had been built into the carrier conference agreements had the practical effect of making travel agents the sole distributors of airline tickets for commission. In short, exclusivity substantially reduced competition. Finding no overriding reason to retain those restrictive provisions the Board removed exclusivity and antitrust immunity, thus permitting airlines to appoint and compensate whomever they choose for the distribution of their tickets.

Some of the specific elements of the Board's decision are worth repeating.

First, it concluded that the public interest would be best served if the marketing of tickets operated in a competitive environment subject to the antitrust laws rather than the detailed and costly oversight of the CAB or its successor. Therefore, it lifted antitrust immunity.

Second, it found that air carriers ought to have the freedom to take advantage of other marketing options to distribute their tickets. To this extent, the Board's decision is permissive, not mandatory. No carrier would be forced to appoint a BTD or any other distributor.

Third, it found that the current provisions which prevent business travel departments from becoming accredited agents have unreasonably restrained competition and should be eliminated by 1985.

Fourth, the basic framework of the existing travel accreditation rules is approved very much as it now exists. Among other things that means that the standards relating to financial security and competence have not changed.

Fifth, it found that the carrier conferences, the agents, and potential new sales intermediaries may need time to adjust to the competitive market; so it provided for a generous two year transition period.

PROBLEMS WITH H.R. 2053

H.R. 2053 orders the CAB to vacate this decision in favor of competitive marketing and adopt instead an earlier finding by Administrative Law Judge Ronnie Yoder. The difference between the CAB decision and that of Judge Yoder centers on exclusivity and antitrust immunity. Judge Yoder's decision permanently retained both of these protections for travel agents thereby perpetuating a monopoly situation. By substituting the Yoder decision, H.R. 2053 has the same effect—entrenching a system of exclusivity. We believe that the CAB's decision was well-reasoned, carefully crafted and should be left intact.

Mr. Chairman, H.R. 2053 does not serve the interest of the traveling public. It protects travel agents from competition and harms the public by denying them the benefits of a competitive marketing environment. In the long run all of us will pay a price for this.

To begin with, exclusivity and antitrust immunity have eliminated any incentive for agents to compete on prices, which would mean accepting lower commissions from the airlines. In fact, since 1978 agents sales commissions have risen steadily from 7 percent to nearly 10 percent today. These increases have been disproportionately high compared to other operating costs of air carriers. Commissions have more than doubled from 2.8 percent of airline operating expenses in 1970 to 6.2 percent in 1982. Between 1981 and 1982 alone the total commissions paid out by airlines jumped almost nine percent from $1.95 billion to more than $2.2 billion while overall operating costs increased a little over one percent. Some individual carriers were hit even harder. American Airlines saw its commission payments go up 16 percent (to almost $244 million). United Airlines paid out 12.6 percent more in commissions in 1982 than in 1981, an increase totalling over $295 million.

These disproportionately large increases in commissions undoubtedly affect the price of airline tickets for all travelers. H.R. 2053 perpetuates exclusivity and the travel agent monopoly insuring that agent commissions will not be tempered by competitive market forces.

Since this upward spiral of commission payments is obviously costing the airlines and consumers, one obvious question is, "Why have airlines not acted to reduce commission levels?" And why are air carriers not offering corporate customers and other frequent flyers bulk discounts as the CAB said they could in 1981? The reason is simple: air carriers fear travel agent reprisal. Although most carriers will not discuss it publicly, travel agents, by virtue of their market dominance, have the ability to influence airline marketing decisions and dissuade them from taking actions adverse to the interests of the agents. The most common practice is to "plate away" from carriers who step out of line.

Let me give you some examples:

In February of 1980, the CAB withdrew the 7 percent fixed commission and ordered airlines to make individual plans to compensate agents. United Airlines was the first to respond coming in with a proposal to pay a flat $8.50 per ticket transaction. But that proposal generated so much opposition among agents that United quickly withdrew it and replaced it with a sliding scale of payments ranging from $7.50 to $37.50 depending on the distance flown.

Despite its policy reversal, United was not left unscathed by its innovation. In March, the airline showed a 14 percent drop in traffic. At the time, Newsweek magazine reported one San Francisco agent saying that she redirected 30 percent of her United business to other airlines.

A travel agency president in Florida wrote an editorial in Travel Trade News Edition which warned,

" . . . If United does not revise its $8.50 per coupon fee I will not sell any United ticket or any tour using United as the carrier. I am prepared to return the United plate if the airline does not maintain its present commission percentage policy." [1]

Another agent in Los Angeles confessed his reaction. He is quoted in the same source as saying,

"First thing I did was to request my office staff to lay low in selling United Airline tickets unless the client particularly wanted United routing. Otherwise they were to route each client to other carriers."

Statements on the record before Judge Yoder provide further evidence that agents not only have the power to influence the airlines but are willing to do so when necessary. Following a decision to lower commissions, James Palm, Director of Sales Development for Republic Airlines, noticed a sudden decline in traffic and made this observation on the record,

"Our feedback from our district sales people indicated that we were losing groups. . . . On a couple of occasions we were informed that individual travel agents were instructing their people to use us only when they had to, and things of that nature." [2]

Similar reprisals have also been experienced by airlines which attempted to lower their commission rate. Last year Frontier Airlines attempted to lower its commission from 10 percent to nine percent. It was "plated away" from so badly that it was quickly forced to return its commission to the original level.

Other airlines spoke directly about commissions in testimony before Judge Yoder. Randall Malin, Senior Vice President of Marketing for U.S. Air, responded to cross examination in the following manner:

Question. Now with respect to your decision to raise the commission level from nine to ten percent, is it fair to say that as a part of your decision making process you considered the risk that you might incur of having traffic diverted to other carriers in the event you did not raise the commission?

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[1] *Travel Trade News Edition,* April 28, 1980, p. 6, 7.

[2] 52 Tr. 136, CAB Docket 36595.

Answer. Yes, I did.

Question. So was that the principal factor in determining to raise the commission level?

Answer. Yes, it was.

Roger Nesbit, Director of Passenger Sales Accounting, Continental Airlines:

Question. With respect to the recent increase in commissions that we talked about from nine percent to ten percent, were you concerned about diversion of Continental's sales to other air carriers in the event that you would not have increased your commission level?

Answer. Yes, that would definitely be consideration.

Question. Would you agree that it was at least the risk of diversion that motivated in part the change in commission levels from nine percent to ten percent?

Answer. In part, yes.

Question. If not actual diversion?

Answer. Yes.

With this market power and the magnitude of the travel market it is not surprising that the travel agency business has become very attractive and very profitable. While many airlines are struggling to stay afloat, travel agents are doing better than ever and their numbers are growing.

The number of travel agents in the United States has grown from only 6,700 in 1970 to almost 20,000 in 1981. Their annual dollar volume for all services grew in the same period from $5 billion to over $31 billion. Perhaps more telling is the fact that at the time of deregulation in 1978 only 38 percent of domestic air travel was being handled by agents. That figure has now risen to 60 percent in the domestic market and nearly 80 percent in the international market.

Under the travel agent monopoly consumers also lose out in other important ways.

The bill would prevent new and more efficient distribution systems and discourage retailers who might offer lower commissions and limited services. Although Judge Yoder allowed a special exception for Ticketron, his decision prohibited air carriers from appointing business travel departments, banks, credit card companies or other firms yet to be identified to distribute their tickets. Not only does this deny the public a choice from an array of qualified retailers but it forces airlines to pay full service commissions to agents regardless of the nature or level of the service they provide. Airlines are forced to pay the same 10 percent commission on every transaction regardless of whether it is a ticket to London, England or New London, Connecticut, or whether the agent simply wrote a ticket or engaged in extensive travel planning.

By the same token, competition between agents on the basis of service is pointless for those customers who desire a limited ticket writing service and want to pay accordingly.

The innovations which a monopoly situation precludes are likely to be substantial. I can imagine a day when I can call up airline reservation schedules on my cable television screen and make a reservation directly with the airline perhaps at a discount since no commission would be paid. This would save consumers and airlines money. I can also imagine a situation similar to that which occurred in the securities industry following its deregulation in 1975. Discount brokerage houses sprang up offering to handle simple transactions for those customers who knew exactly which stocks they wanted to buy. In some cases, commissions on those services are now about half of what they were prior to deregulation. Unfortunately, as long as the travel agent monopoly exists, there are no incentives for the development of such alternative distribution modes for airline tickets.

BUSINESS TRAVEL DEPARTMENTS

Before I address some of the arguments made by proponents of H.R. 2053, I would like to talk specifically for a moment about business travel departments—how they operate, their relationship with air carriers and their functions as compared to travel agents.

Businesses—including small businesses—and others who engage in business travel have basically three options in deciding how to manage their travel: the "in-house" option where an organization does all its own travel and probably deals directly with the airlines; the "inplant" option where the organization conducts its own business travel in "partnership" with an independent travel agency; and the "full service" option where the organization contracts all its work out to a travel agency.

In each case the compensation is different. With the completely in-house method the BTD does all the work, obviating the need for a travel agent, but it receives no compensation from the airlines. In the inplant situation, travel agents receive about a three percent commission from the airlines of which a negotiated amount, usually about two percent, is passed on to the BTD. The inplant travel agency receives the remaining one percent primarily for allowing the BTD to use its plate. Usually the operation is run entirely by the BTD with the inplant agency doing little or no work. Under a full service arrangement a travel agency receives the full 10 percent commission on the organization's business. The company receives nothing.

Most BTD's provide a service remarkably similar to that which travel agents provide. In fact, BTD's are at least as well equipped, perhaps better equipped, in several respects to fulfill the distribution and sales function for the business traveler.

First, most BTD's currently have the same professional competence and capabilities as travel agents, including computerized equipment, ticket stock, interlining authority, training and good relationships with the airlines.

Second, unlike travel agents, BTD's have a clear motivation to identify the best air travel arrangements at the lowest cost. Their recommendations would not be influenced by the special benefits, such as free trips, now offered to individual travel agents.

Third, as I explained, where inplants are used, BTD's receive up to three percent commission by handling all of the organizations business travel, using an agent's plate, becoming in effect an extension of the travel agency. Again, agents receive a portion of that three percent commission for lending their ATC plate to the BTD but they do not perform the traditional travel agent function.

I might add that this is a system which was approved by the airlines. Clearly, air carriers have recognized the competence of "inplant" business travel department.

This leads to a fourth point which is central to the entire concept of competitive marketing. Business travel departments are among many potential new distributors of airline tickets. They could serve the airlines at a lower commission rate which would benefit all travelers. Let me now turn the Committee's attention to the arguments of those who would reject the CAB decision.

ARGUMENTS OF THE OPPONENTS OF THE CAB DECISION: A CLOSER LOOK

It is unfortunate that public discussion of the Board's decision has been clouded by a number of unsubstantiated and overstated charges suggesting in various ways that competition in marketing will lead to the wholesale collapse of the air transport system as we know it, and that as a result consumers, airlines and, of course, travel agents will suffer. These assertions are false and I would like to take a few moments to tell you why.

To begin with, if we believed the efficiency of air transportation would be undermined, NPTA would not be opposing H.R. 2053. Business travelers rely more than any single group on efficient and dependable air transportation. If the system were to fall apart tomorrow, become more costly or less efficient we would be the ones to suffer most. We obviously don't believe this will happen. The CAB did not believe it would happen either.

It has been asserted that competition in ticket distribution will drive hundreds of travel agents out of business. There is no basis in fact for this claim.

Travel agents provide a valuable service—to airlines, to discretionary travelers, and to the majority of the business community. As long as agents serve as conscientious representatives of the airline principles and provide competent advice to their clients, airlines would have no reason to significantly alter their marketing strategy. And, in fact, the Board's decision does not force them to change. Only when the inherent cost advantages of using agents is outweighed by excessive commission charges or if more effective marketing practices develop will non-conference marketers have a significant impact on the market.

Empirical data also belies the claims that agents will be put out of business. In fact, revenue losses from travel agents due to the participation of BTD's other non-conference marketers are likely to be minimal.

To begin with, any impact on the market is likely to be on the largest agencies. In 1978, 18 percent of travel agents that handled corporate accounts dealt exclusively with large corporations. The vast majority (72 percent) dealt primarily with medium and small corporations who probably would not have BTD's because it would not be cost effective. Moreover, the larger agencies tend to deal predominantly with larger clients. Given the cost of operating a BTD even with some compensation, accreditation is likely to be attractive only to the larger users of air transportation. Thus, the small agencies will probably not be affected.

Predictions on revenue shifts also dispel the notion that BTD's will undermine the market. The American Society of Travel Agents' (ASTA) own economic testimony before the CAB estimated the BTD-handled sales would increase by only $250 million over what they already handle.[3] As a fraction of all $19 billion in business travel, that represents only about a 1.3 percent shift. And it assumes that all the lost business would come from sales previously made by agents. In any case the bulk of that business is more likely to come from the largest agencies. Hence, the assertion that small travel agencies will be displaced by BTD's is factually unfounded.

Even taking into account the impact of all potential new distributors ASTA predicted that travel agents total market share would only drop from 53 percent to 51 percent—a two percent drop in agency sales.

Some proponents of exclusivity have taken the position that airlines will abandon the common accreditation system and other arrangements in which they now participate. On the one hand they argue that these arrangements are both efficient and desirable to airlines, agents and customers. But at the same time they suggest that the system is so fragile that it will surely collapse with the introduction of competition and that air carriers will be willing to abandon them. This is sheer folly. Air carriers have every incentive to maintain high standards—ticket distribution is vital to their business. Common accreditation is also a more cost efficient means of marketing their tickets. They have every reason to continue to participate.

It has also been suggested that under competition carriers would abandon their practice of using interline agreements for travel involving more than one airline, thereby forcing travelers into the grim task of carrying their luggage from one airline to another. This is ridiculous. Interline agreements permit one airline to write air transportation on other airlines that are parties to the agreement. When one carrier writes a ticket involving another, the first carrier is responsible for any loss. The CAB explicitly found that exclusivity is not necessary for interline agreements to continue. Therefore, carriers would certainly continue to make such cooperative arrangements in a competitive environment. The convenience and economic incentives of the agreements would continue to exist.

Even airlines themselves have reached these conclusions. In a recent interview in Travel Weekly, John Zeeman, Senior Vice President of Marketing for United Airlines, spoke frankly about the removal of exclusivity and antitrust immunity and its effect on airlines participation in the carrier conference and interlining. When asked if carriers would abandon these practices Zeeman replied,

"There may be some that would, I doubt it. I think that from our evaluation of that system it will pass any screen. And I think most of the carriers will come to the same conclusion and they will realize that it is a very effective way for both the airlines and the agencies to conduct their business. I don't see that going away with or without antitrust immunity.

"The same thing I would say of interlining in terms of bags. The basic way that the airline industry conducts its business, I think, would be retained with or without antitrust immunity."[4]

Opponents of the CAB Decision have also suggested that airline tickets will be sold by persons who will not know what they are doing—gas station attendants, bartenders or the "butcher, baker and candlestick maker." This is preposterous. There is absolutely no reason why airlines would ever allow this. Ticket stock is like a blank check. It would be foolhardy to hand it over to an incompetent distributor. Airlines have a legal responsibility to provide air transportation or refund the ticket. And, as I explained, carriers are financially responsible for any tickets that are written which connect to another carrier. If nothing else, an airline can ill afford to have its customers suffer inconvenience or loss at the hands of incompetent ticket distributors. Airlines are likely to insist on high standards even for its non-conference marketers.

Finally, to further muddle the question of whether airlines should be permitted to appoint non-conference marketers, it has been suggested that BTD's are really purchasers of air transportation and therefore should not be compensated by the airlines. From the outset, one would think that this is something that airlines are capable of deciding on their own. After all, it is the airlines product that is being sold. They should have freedom to appoint and remunerate whomever they choose for marketing their product. I should note here that travel agents and airlines have already recognized, through the use of inplants, that BTD's are in effect the functional equivalent of travel agents. They interact with airline computers. They have their own ticket stock and already write tickets. They interline, and they even receive a small commission. From the perspective of the airline, BTD's offer the same sales and distribution function as a travel agent. The only difference is that the travel agent makes 10 percent on every ticket sold. BTD's are disenfranchised simply by virtue of their relationship with their company and receive nothing.

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[3] Exhibit ASTA-20, p. 111, CAB Docket 36595.

[4] (Travel Weekly, May 16, 1983, p. 8).

The CAB decision noted that it is acceptable business practice for a firm to profit from sales to itself. There is no legal prohibition to such a practice. In fact, it is a well accepted economic principle in other sectors of our economy. The CAB has already addressed this concept in an analogous area. In the context of air freight transportation the Board approved the airline practice of compensating individuals not affiliated with the carrier for preparing cargo for shipment. This was true even where the user and the preparing agent were one in the same entity.

CONCLUSION

In conclusion, Mr. Chairman, this bill which is barely two pages long has enormous implications for the airline ticket marketing system in this country. It turns back the clock on everything the CAB has done to carry out the mandate of Congress to deregulate the airline industry.

The CAB said that the time has come to break the travel agent monopoly and give airlines the freedom to market airline tickets as they see fit. The evidence on the record supports this decision.

H.R. 2053 says, no, we should not only give travel agents back their monopoly but we should make it permanent.

The National Passenger Traffic Association urges the Congress to reject H.R. 2053, which would reverse the CAB decision and deny the public the many benefits of competition. Let us allow the free market to work so that customers and airlines can obtain the best value at the lowest cost.

Mr. LUKEN [presiding]. Thank you very much, Ms. Macchia.

I was just looking at the ALJ's decision on page 83, I quote:

> Accordingly, we conclude that ATC agreement provisions establish a market exclusivity. That is, those restrictions which prevent marketing through non-agent ticket distributors or prevent their compensation through commission must be disproved.

If we took the ALJ's decision, rather than the CAB decision, this might conflict with your testimony to some extent. But in any event, the ALJ says that nonagent ticket distributors such as business organizations can be compensated on a nonagent basis.

Do you disagree with that?

Ms. MACCHIA. That has not been done.

Mr. LUKEN. I understand it hasn't been done. As a matter of fact, we have gone a lot further than that, at least perspectively. But if that were the current system with just this added, would you think that that would go far enough to satisfy your situation or your requirements?

Ms. MACCHIA. I am sorry, John. Would you like to answer that?

Mr. BACON. I don't think so, Mr. Chairman. There has been nothing in the past few months to indicate that the airlines were interested in making that kind of a commitment.

They still feel any reprisals from the agents who are making that type of agreement with anyone. No one has been approached——

Mr. LUKEN. Isn't that the free market operating?

Mr. BACON. Say that again, sir.

Mr. LUKEN. Isn't that the free market operating?

Mr. BACON. I don't know that boycotting is an indication of the free market operating; no, sir.

Mr. LUKEN. Well, you have characterized the reprisals as boycotting. I suppose if it is an illegal boycott, then they would have legal redress, wouldn't they?

Mr. BACON. If they choose to take that redress or if they choose to deny that redress due to the fact that they feel like it would be to their disadvantage.

Mr. LUKEN. Isn't it true that commissions rose, as you have described, as a result of the CAB's disallowing of fixing of ticket commissions, which was formerly done by the airlines? Doesn't that indicate that the true market clearing price is about 10 percent, where it is today?

Isn't this a product of deregulation?

Mr. BACON. To some extent, yes.

Mr. LUKEN. Or, at least a product of the free market?

Mr. BACON. I would say it is a product to some extent of deregulation, not necessarily free market.

Mr. LUKEN. It is my experience in some areas like real estate commissions, where they have huffed and puffed and tried to avoid the operation of the self-regulation of the industry, that they have all returned to approximately where the industry set the commissions anyway.

Mr. BACON. At least they gave themselves the opportunity to do that, sir.

Mr. LUKEN. Are we interested in theoretical opportunities? I think that is the big issue that divides us. It has all morning. The Commission comes in here and says, we want to give you theoretical deregulation and theoretical opportunities. But we want to talk about the factual situation in each industry, and in this particular industry, not some mythical deregulation purpose.

Mr. BACON. This industry has been set aside as a specific one.

Mr. LUKEN. Each one is a specific one.

Mr. BACON. As far as deregulation is concerned——

Mr. LUKEN. The gentleman who told the little story about the plumber about to perform the surgical operation, I have had the experience working on Federal Trade Commission matters of recognizing that with regard to the professions, we talk about deregulation and we talk about jurisdiction of the Federal Trade Commission or of the Justice Department.

But the fact is every licensing act on the part of any government agency is anticompetitive. We can't talk about deregulation in the absolute.

When we license doctors, when we license dentists, or lawyers, or accountants, we exclude everybody else. We do this kind of thing all the time. So all I am saying is what we want to do is look at the actual situation in the industry and what would be of the most benefit, rather than to pursue a nebulous goal of deregulation.

Mr. BACON. If we are going to deregulate a portion of the airline industry, why not deregulate the distribution of the tickets?

Mr. LUKEN. I think that is what you have just reiterated. Why not? I don't know why not.

I am not impressed with that argument as being the final answer. But on some specifics, I think you have spoken of monopoly over airline ticket sales.

This is an industry which has over 20,000 different agents who have that monopoly.

In the face of the companion fact that the individual airline companies sell about 40 percent of the tickets directly, and they are willing to pay the businesses who want to sell tickets or they have the legal right to pay, we are not restricting the compensation to the individual business. What do we call them? Not agencies. I don't want to use the wrong word.

Ms. **Macchia**. BTD's.

Mr. **Luken**. Travel departments, they have the legal right to pay that. Does that describe a monopoly?

Ms. **Macchia**. Yes, Mr. Chairman, it does. In 1954 when I started with Allied Corp., we used to handwrite tickets to the tune of $15,000 a month, and from the time that we have had the tickets—and I don't know how far earlier than that we had them, but corporations could not collect a commission.

So, in essence, any ticket issuing that was done by corporations——

Mr. **Luken**. You couldn't collect, why?

Ms. **Macchia**. Any money back on the tickets that were issued. So that we were doing, in essence——

Mr. **Luken**. What do you mean "they couldn't"?

Ms. **Macchia**. You could not collect. We can still not collect—well, we can now, but no one has come forth. But in 1954, up until 2 years ago, it was you could not collect any commission back on——

Mr. **Luken**. Because the whole industry was regulated?

Ms. **Macchia**. That is right. On any kind of percentage of money.

When we talk about a monopoly, the monopoly we are talking about is the fact that, yes, we have been issuing tickets, yes, we have computers. We do exactly the same type of work as an agent, excluding the fact that maybe our concern is monitoring our own company's requirements and the travel policies that each company establishes from within.

We have been involved in this competitive marketing case, I think, for about 14 years. At one time it was called cost sharing, and it just meant getting back for the corporations a percentage back of what it cost the corporation to maintain an in-house travel department.

That was never forthcoming. So, as a result, we had small companies. The NPTA has many small companies, one and two people departments that are operating their BTD's, that were issuing the tickets who were fair game to a travel agent who would come into the corporation and say we can do this for you for nothing, just let us write your tickets and we collect the commission from the airline.

I would venture to say that half of the people in the country are not aware that no matter how good or bad a travel agency is, there is a built-in guaranteed commission, no matter how good or how bad.

Once that ticket is issued, they are guaranteed the commission. To me that is a monopoly to a certain extent. As Mr. McKinnon said, we are maintaining an in-house travel department, we are holding those jobs because we are good and because our companies feel we should be able to do it. I deal with a travel agency. I will continue to deal with the travel agency for our vacation needs and for our programs.

Many honest travel agencies do not want to handle a busy commercial account because the cancellation factor in my office is 80 percent. That is a lot of Syracuse, that is a lot of Washington tickets that have to be reprocessed.

Mr. LUKEN. Is that why the airlines are a little reluctant to pay you a commission?

Ms. MACCHIA. No, not at all. In fact, every airline that I have spoken to hopes that somebody will do it before them. I have been told by three carriers they are just waiting for someone else to come forth with it first.

Mr. LUKEN. What are they waiting for if they can do it now? Are they waiting for the protection of some legal mechanism?

Ms. MACCHIA. Yes, they are.

Mr. LUKEN. Some of us want to interrupt that intervention.

Ms. MACCHIA. They are afraid because, as United, if they are the first ones that come out protecting and coming forth to the corporate accounts that they will be blacklisted for 1 day or 2 days, and with the financial circumstances of many of the carriers, that would create a problem. Mr. McKinnon said he doesn't know of any proposals that have come forth yet, and I can tell you of some. There are some new airlines that are starting up that are talking about a net fare concept, which would mean that the consumer can go up and buy a ticket at a net cost.

If you decided to use an agency would show their amount of service fee for handling that ticket. There is one carrier that is talking about that. There is another airline that is putting together the inside of an airline to have business rooms so that the businessman can have a meeting in there. They are talking about money upfront. So there are other concepts that are coming forth in the marketplace.

Mr. BACON. I might also point out, Mr. Chairman, that as the ruling sets now, the next 2 years if you want to make an agreement with an airline, you can, but you can't interline. You have that agreement only with that airline.

If a business travel department wishes to go to an airline and that airline so chooses to make a special arrangement with him, it is strictly for that airline. It has no interlining agreement with it at all.

Mr. LUKEN. Reluctantly, I am going to announce that my time has expired. The gentleman from Minnesota?

Mr. WEBER. Thank you, Mr. Chairman.

I am sorry I had to be out of the room for some of your testimony. I would just like to follow up on a few things, though, that were said since I was here, and I hope they weren't covered in my absence. Let me know if they were.

First of all, I have to question you, Ms. Macchia, about the definition of a monopoly. You seem to be arguing that a monopoly existed because commissions were guaranteed regardless of the service provided by the travel agent.

Yet, it seems that with prior witnesses, we established, at least to my satisfaction, that the travel agent business is relatively competitive. People can get into the business relatively easily.

Very few of those who apply to get into the business are denied access. People do go broke and leave the business. It seems to me that you may be describing something, but it doesn't seem to me you are describing a monopoly.

Ms. MACCHIA. A corporation cannot go into the travel agency business. We cannot become a travel agency. Allied could not become a travel agent. None of the NPTA members could become a travel agency.

We are restricted. Mr. Bacon cannot become a travel agency.

Mr. WEBER. You could not become a travel agent. You could not apply?

Ms. MACCHIA. Could not. We are disqualified.

Mr. BACON. We are excluded.

Ms. MACCHIA. It is the 80 to 20 percent rule.

Mr. BACON. To date we are excluded from being a travel agent. We cannot get a travel agency appointment from ATC or from IATA directly.

We must go through a travel agent as a representative. Actually, all we are doing is renting their plates. To date, we still cannot be an accredited agent.

Mr. WEBER. Without pursuing my point, though, is that what you are arguing? Do all those thousands of small business people out there have a protected position?

That is not really the same as saying that they have a monopoly regardless of service rendered.

You know, if the service rendered is not adequate, presumably you will do business with some other travel agent.

Ms. MACCHIA. Unfortunately, a person who is buying a ticket through an agency for the first time, unless they know who the agency is, isn't aware until maybe the end of the trip whether the service is good or the service is bad.

Mr. WEBER. We are not talking about individuals here. We are talking about the companies that establish business travel departments, aren't we?

Ms. MACCHIA. Yes.

Mr. BACON. Can you restate your question?

Mr. WEBER. Isn't that the thrust of your testimony? It is the interests of the corporations that are engaged in business travel; correct?

Ms. MACCHIA. Yes.

Mr. WEBER. Those people aren't exactly naive about flying. I agree with what you said about the individual flyers being inexperienced and dealing with travel agencies. I don't think that that is true of the companies that you are speaking for, is it?

Mr. BACON. I don't think a lot of my engineers in the field really know a whole lot about air travel or business travel. That is what they call me for.

Mr. WEBER. Because we are running a little short on time, I wanted to clarify one more thing. You said that some airlines are willing to pay you commissions.

Just for the record, could you tell us what some of those airlines are?

Ms. MACCHIA. No, I would not.

Mr. WEBER. Could you tell us if they are members of ATC?

Ms. MACCHIA. Yes, they are.

Mr. WEBER. Doesn't that seem a little inconsistent that they, on the one hand——

Ms. MACCHIA. No. They have been doing that for years, for as long as I can remember, and I think that every BTD will tell you the same thing.

When we first started talking about cost sharing, the NPTA was not talking 10 percent. We were talking about let us do our segment and apply to our corporations and what they want them to do and we were coming up with the cost-sharing proposal of 3 percent. I think at that time the agency commission was nine. Many of the airlines had said that we have proposals, we are just waiting for somebody else to do it. I think that any corporate account that you talk to will tell you basically the same thing.

Mr. BACON. I think all the airlines for years have recognized that we supplied a definite service for them and to them, and to the people that we serviced within our corporations, and have not denied that we do a good job in what we do.

Mr. WEBER. It just strikes me that if that were the case, we would see a little more pressure from the airline industry on behalf of the changes that you are supporting, and I don't know that we have necessarily seen much of that.

Mr. BACON. Isn't that strange?

Mr. WEBER. The airlines.

Mr. BACON. Isn't that strange? A business travel department that has gone to the expense of installing computer systems that are available from the airlines and are actually circumventing their costs in going directly to their reservation system, the expenses that they would have incurred by having reservations on their payroll in order to handle that business is now being circumvented and that cost is being absorbed by the corporation for them, have not come forth and offered some cost sharing.

They don't even offer to subsidize the equipment you put in your office.

Mr. WEBER. We are fascinated, too, but could you give any reason?

Mr. BACON. Give any reason? Yes.

They don't want to be——

Mr. WEBER. You asked the question, isn't it strange. But what is the answer to that question?

Mr. BACON. The answer to that question is, none of the airlines wants to be the first one out of the box.

Mr. WEBER. Why?

Mr. BACON. Why? Because they are afraid of reprisals from their distribution marketing system that they now have. They are afraid that they will lose market share where they are discriminated against in the distribution of their tickets.

Mr. LUKEN. It is your time which I interrupted. Now Mr. McCloskey wants a turn.

Mr. **Weber**. I would be glad to yield to anybody who can help us clarify this whole thing. Let me yield to my colleague.

Mr. **McCloskey**. I think this is the crux, really, the main question of the day, you know, will the real TWA or United Airlines stand up. Just as a matter of common sense, it would seem that if the airlines have a shared policy of strong concern and they stated it together, it would be very hard for any set of travel agents individually or collectively to discriminate against them, assuming they want to stay in the business. I think we heard Mr. Meredith speak very forcefully that the airlines feel one way and Ms. Macchia says they are really with her group, in essence, but they are afraid to speak out.

Mr. Chairman, I would just suggest it would be good to get individual groups representing airlines here and really ask them what is going on and what do they prefer.

Mr. **Weber**. Ms. Macchia, did you want to respond? I didn't want to cut you off, but I wanted to give him an opportunity.

Ms. **Macchia**. Thank you. I think anyone within the airline industry—and Mr. Meredith is a very dear friend of mine and we have been dealing together many years and we have parking privileges that British Airways provides—business travel departments have been recognized.

The reason the domestic airlines, and many of the international ones, too, they are on the brink—there are two or three of them right now that have a horrendous problem. I understand the concern of the travel agents, because until, as Mr. McKinnon said, when you talk one-on-one, I don't believe the small agents are going to be put out of business because the vacation traveler will still go to that personal one that is involved.

The airlines are waiting very patiently. In-plant has not helped the airlines. In the past, Allied Corp. has been a total, noncommissionable account; $7 million that we do out of our one location. That was all noncommissionable.

Now, because of in-plant, we are getting a percentage back from the airline. The airlines, really, now have—they are talking out of both sides of their mouth.

I have a lot of compassion for them because when you are just barely covering costs and if you come out in support of this decision, and everyone knows how upset the agent industry is, and if you had 2 days of blacklisting, and all the publications that you read will talk about—I mentioned a comment at one of my talks to a group of our people about vacation travel, that we, Allied, would be getting into vacation travel. The next day in the press I read that an agent said that they would find out who I was using, and make sure that we didn't use them. Well, I had been using an agent to do vacation travel. I think that that is the kind of reprisal that the airlines are concerned about.

I think you can invite everyone up here, other than their testimony that has gone before, they would tell you the same thing, that they are afraid of agent reprisal.

Mr. **Weber**. If I can just interrupt, and then I will yield back the balance of my time.

Mr. **Luken**. I think we can give the gentleman from Indiana time on his own.

Mr. **Weber**. OK. The only reason I would have to argue that is because we are in an area of speculation here. What are people saying privately, what are they saying publicly?

We have a couple of Minnesota-based airlines, and I know the people that work for them, that run them, and that are on the board of directors. I spent a lot of time with them both socially, as well as publicly.

I have never had one of them say to me behind the scenes we are really concerned about agent reprisal; I never had one of them tell me we may say one thing publicly but then we would like you to know this is really what we think. I have never had that kind of communication.

I would think that if there is this kind of communication going on below the counter or behind the scenes, that I somewhere would pick that up, and I haven't. Wouldn't it strike you that I would hear that from somebody from Republic Airlines or Northwest Airlines or one of the other airlines that I deal with?

Ms. **Macchia**. Republic was one of the ones that had a problem and they changed their commission rate and they lost a lot of money.

Mr. **Luken**. The gentleman's time has expired. I will call upon the gentleman from Indiana, Mr. McCloskey.

The gentleman mentioned the question of where the airlines stand. I am not suggesting this disposes of the question, but Mr. Phillips represents Air Transport Association of America, which I understand, and anybody can comment on that if it isn't correct, is the association for the domestic airline carriers, and he testified unequivocally in favor of the legislation and against the CAB decision.

Mr. **McCloskey**. I understand that, Mr. Chairman, but as you can see there is a tremendous disparity allegedly as to what the real position of the airlines is. I apologize for interjecting. I would yield any time I have.

Mr. **Luken**. I started it, so don't apologize because you can make me apologize.

The gentleman from Indiana.

Mr. **McCloskey**. I have no further questions, sir.

Mr. **Luken**. All right. The gentleman from Florida?

Mr. **Bilirakis**. Ms. Macchia, you work for Allied?

Ms. **Macchia**. Yes, I do.

Mr. **Bilirakis**. You are president of NPTA. Are the members of NPTA people who are in the business travel departments of firms like Allied? Is that basically what constitutes it?

Ms. **Macchia**. Yes, they are.

Mr. **Bilirakis**. So they are all business travel departments?

Ms. **Macchia**. Yes.

Mr. **Bilirakis**. Your testimony is replete with taking off at the travel agents. Is your concern more than anything else economic, meaning bottom line, basically what it is costing your firms or your companies for business travel? Isn't that really your concern?

Ms. **Macchia**. To a certain extent, it is. It is also to better protect the business travel departments who are a one or a two operation department.

Mr. **Bilirakis**. How would getting the travel agents out of the picture better protect them?

Ms. **Macchia**. Not really out of the picture, but just so that the corporations can best justify their existence by a little financial return back into the corporation. Where it is an extremely small in-house travel department, the cost of maintaining that in-house travel department is a big concern to a small corporation, much more than it is to a larger corporation.

Mr. **Bilirakis**. Allied, I know, in Florida—which, I believe, is Maas Bros., is it not, in Florida?

Ms. **Macchia**. We have been buying so many, I——

Mr. **Bilirakis**. All right. Well, in any case, Maas Bros. in Florida, and I believe they are part of Allied, has travel departments.

Now, I don't know the intricacies there, whether they are owned by the corporation itself, or whether they spin off from the corporation, but there are travel agencies that are located in many department stores, in some banks.

But banks have travel departments. The employees of banks ran the travel departments. At least, there are still a number of banks in Florida, particularly, that own travel agencies.

Ms. **Macchia**. That is illegal in some States, I believe.

Mr. **Bilirakis**. OK. Well, that is a State law then?

Ms. **Macchia**. Yes.

Mr. **Bilirakis**. But that would not have anything to do with Federal jurisdiction or the CAB. Are there no travel departments or travel agencies in your department stores?

Ms. **Macchia**. I don't know of any. I know that in New Jersey you can have—and I think it was a grandfather clause because the agency that we are in-plant with is a bank. But I know of none that are in a department store.

Mr. **Bilirakis**. Mr. Chairman, time is a factor here. I, too, would like to hear what some of these other firms have to say.

Mr. **Luken**. Yes. We only have one panel left, and we may run into a series of votes shortly.

Mr. **Bilirakis**. I am concerned, and I am not asking for an answer here now, but I didn't know that corporations could not own travel agencies. I know that many travel agencies are incorporated.

Ms. **Macchia**. Yes. They get full commission.

Mr. **Bilirakis**. Yes. They get full commission.

Ms. **Macchia**. Yes.

Mr. **Bilirakis**. Why can't Allied own a travel agency or a subsidiary of Allied own a travel agency?

Mr. **Bacon**. They can.

Mr. **Bilirakis**. They can?

Mr. **Bacon**. They can. Yes, they can.

Mr. **Bilirakis**. They can? Why don't they open up a travel agency then and get the full commission?

Mr. **Bacon**. Because they are interested in the business travel and the control of the business travel. They are not interested in going into the travel agency business.

The travel agency has a business and a function out there, and Tenneco is not interested in going in the travel agency business. We are interested in our business.

Mr. BILIRAKIS. Sir, with all of the traffic that comes into the various department stores, Tenneco, of course, is not in that category, but with all the traffic that comes in—I assure you that there are many department stores, particularly in Florida, that have travel agencies located—you will use the actual Maas Bros., or Robinsons, or whatever it is, credit card to charge your trips in that department store.

As a matter of fact, it is tied into their accounting system.

Mr. BACON. Yes. They are an accredited travel agency. They have applied for ATC appointment and received that ATC appointment.

Mr. LUKEN. The gentleman's time has expired.

We thank you very much for your very clear and forthright testimony.

We now call upon the final panel of Richard Knodt and John Archer. Mr. Archer, you are the managing director of government affairs of the AAA. We have your written testimony which will be received without objection.

Mr. WEBER. Mr. Chairman, I just wonder if I can inquire. I hate to crowd the panel, but because we probably are going to be called on to vote, and I, for one, am not going to be able to come back after that, I wonder if we could urge the panel to summarize and get us to questions just as quickly as possible.

Mr. LUKEN. All right. We will introduce Mr. Knodt now, and perhaps you will forgive us for enforcing brevity. I think many of your points of view have already been stated both from the witness chair and from this direction.

Who wants to go first? Mr. Archer?

PANEL CONSISTING OF JOHN ARCHER; BARRY ROBERTS; AND RICHARD KNODT

TESTIMONY OF JOHN ARCHER, MANAGING DIRECTOR OF GOVERNMENT AFFAIRS, AMERICAN AUTOMOBILE ASSOCIATION

Mr. ARCHER. Thank you. You already have my full statement, though I will even shorten it a little more.

Although AAA might very well be a major beneficiary of the collapse of the ATC travel agency program, we feel that our responsibility is to the traveling public and our members, and therefore, we support the agency program, structure, and rules as they existed prior to December 29, 1982.

We believe that system most effectively served the public's needs, desires, and expectations for at least four major reasons: One, agent impartiality and objectivity; two, lack of consumer complaints in agent processing of air transportation; three, consumer protection from agency default; and four, consumer convenience.

I would like to briefly elaborate on each point.

Under the current system, once an agent meets certain minimum standards involving financial fitness, bonding, personnel, and experience, the agent is appointed automatically by the various airline members of the Air Traffic Conference of America and consequently the agency impartially represents all ATC carriers.

The accredited agent has no incentive to provide biased information to the air traveler. An ATC-appointed agent is able to provide a prospective passenger with the most objective and highest quality of information on fares, schedules, and types of service.

If after January 1, 1985, the current travel agency system begins to disintegrate and eventually evolves into a dealership or broker arrangement, where travel agents would typically represent just a few airlines, objectivity would without question be seriously undermined and perhaps be lost forever.

In short, the public will be the big loser if the ATC agency program is seriously diluted or disappears altogether.

The number of air travel complaints involving travel agents under the present system is remarkably low.

Mr. McCLOSKEY [presiding]. Excuse me, Mr. Archer. May I suggest that we really sum up in maybe three or four sentences from everyone. Those votes are starting on the House floor. It may be the wisdom of the Chair and the group to later convene and hear everyone out in detail, but in the interest of hearing anything, I think we need to ask for fast summaries right now.

Mr. ARCHER. Basically, we think the present system serves the public. We agree with what has been said so often, that the present system works. It is not broken, let's not fix it. It is not necessary.

We support the present program. I will just stop there.

Mr. McCLOSKEY. Thank you very much.

[Mr. Archer's prepared statement follows:]

PREPARED STATEMENT OF JOHN ARCHER, MANAGING DIRECTOR, GOVERNMENT AFFAIRS DEPARTMENT, AMERICAN AUTOMOBILE ASSOCIATION

Mr. Chairman, I am John Archer, managing director of government affairs for the American Automobile Association. With me is Willard R. Brown, vice president of AAA's Travel Agency Services.

AAA is one of the largest travel organizations in the world, serving its 23 million members through a network of more than 1,000 offices, with more than 750 accredited travel agency locations.

Although AAA might very well be a major beneficiary of the collapse of the ATC travel agency program, we feel that our responsibility is to the traveling public and our members, and therefore we support the agency program, structure and rules as they existed prior to December 29, 1982. We believe that system most effectively served the public's needs, desires, and expectations for at least four major reasons:

(1) Agent impartiality and objectivity;
(2) Lack of consumer complaints in agent processing of air transportation;
(3) Consumer protection from agency default;
(4) Consumer convenience.

I would like to elaborate briefly on each of these points:

AGENT IMPARTIALITY AND OBJECTIVITY

Under the current system once an agent meets certain minimum standards involving financial fitness, bonding, personnel, and experience, the agent is appointed automatically by the various airline members of the Air Traffic Conference of America and consequently the agent impartially represents all ATC carriers. The accredited agent has no incentive to provide biased informaton to the air traveler. An ATC-appointed agent is able to provide a prospective passenger with the most objective and highest quality of information on fares, schedules and types of service.

If after January 1, 1985 the current travel agency system begins to disintegrate and eventually evolves into a dealership or broker arrangement, where travel agents would typically represent just a few airlines, objectivity would without question be seriously undermined and perhaps be lost forever.

In short, the public will be the big loser if the ATC agency program is seriously diluted or disappears altogether.

LACK OF CONSUMER COMPLAINTS IN AGENT PROCESSING OF AIR TRANSPORTATION

The number of air travel complaints involving travel agents under the present system is remarkably low. For instance, according to official CAB reports for 1982 there were a total of 10,151 complaints; of those only 113 (1.1 percent) were related to travel agents.

Out of 546 reservation and ticketing complaints only 23 (4.2 percent) involved travel agents. Of 600 complaints on air fares only 18 (3 percent) were attributable to travel agents. And concerning 1,084 refund complaints, only 31 (2.9 percent) related to travel agents. This is indeed a remarkable record since the nearly 21,000 accredited travel agents processed and issued 125 million documents on behalf of the scheduled airlines in 1982.

We believe this extraordinary service record results at least in part from the fact that travel agents are required to meet minimal experience and financial standards before they are able to receive ATC accreditation.

CONSUMER PROTECTION FROM AGENCY DEFAULT

The public has historically been protected from travel agent insolvency with respect to the sale of scheduled air transportation. Indeed, to the best of our knowledge throughout the entire 40-year history of the air traffic conference agency program, no airline ever refused to honor a ticket validly issued by an accredited travel agency, regardless of the financial condition of that agency.

CONSUMER CONVENIENCE

Much of what air passengers take for granted as part of their air travel package is facilitated by air carrier agreements. For instance, it is through the area settlement plan and airline clearing house that such passenger conveniences as interlining are facilitated.

Interline agreements allow air carriers and travel agents to use one standard ticket form when ticketing a passenger on several carriers. The passenger therefore is spared the inconvenience of getting a separate ticket for each leg of an interline flight. Furthermore, interline agreements on ticketing are the reason one air carrier will accept another air carrier's ticket—for instance, if a passenger misses a flight because of overbooking or a delay, he can take his ticket to another airline and obtain transportation.

Interline agreements also facilitate the transfer of baggage between different airlines. On an interline trip, the passenger therefore is not required to pick up his baggage from one airline and carry it to the next airline to be rechecked.

At least one airline, U.S. Air, has publicly suggested that "the ATC travel agency program is a glue that binds the interline system together. Without antitrust immunity, there is a serious risk of eroding, possibly destroying, the worldwide interline air transportation system." If U.S. Air or any other airline acts on this belief, and withdraws from the air traffic conference, the interlining system and agency programs which have served the public so well will be jeopardized. We believe Congress should not allow that possibility to occur.

CONCLUSION

In summary, although AAA is likely not to be greatly affected by the demise of the ATC travel agency program, we nevertheless believe that maintenance of the current system will continue to bring substantial benefits to the consumer, just as it has in the past.

Thank you for allowing us to appear today to express our views relative to the CAB's competitive marketing investigation. We will be happy to respond to any questions.

TESTIMONY OF BARRY ROBERTS, COUNSEL, ASSOCIATION OF RETAIL TRAVEL AGENTS, ON BEHALF OF RONALD A. SANTANA, PRESIDENT, ARTA

Mr. ROBERTS. Mr. Chairman, my name is Barry Roberts, and I am appearing in lieu of Mr. Santana. I am counsel for the Association of Retail Travel Agents.

I wish to emphasize a couple of points. The present system has presented a unique opportunity for people to get into small business who might not otherwise be in their own business.

I think the statistics showing that approximately half of all travel agencies are owned by women, and that a large number are owned by minorities speaks well of this program.

Second, I would like to emphasize the way in which the existence of the system has really benefited competition. It really has helped the new airlines and the new routes.

Third, I would like to respond very quickly to the questions by the business travel departments. The 1978 Deregulation Act itself, I think, disposed of the issue of economic consideration to business travel.

Any business travel department is free to negotiate economic considerations with an airline, whether it be by way of rebates or discount fares. Call it what you will, the law permits them to negotiate it right now.

What NPTA's position boils down to—and let's not make any mistake about it—they are trying to require the airlines to pay something called commissions so that these people can go to their management and say, see, we have generated revenue.

In fact, they can get a 10-percent rebate, which is, as far as I can tell, the economic equivalent of a 10-percent commission if they negotiate directly. The fact that they have not been successful in these negotiations certainly is not a reason for putting thousands of small businesses in jeopardy.

Thank you.

Mr. McCLOSKEY. Thank you, Mr. Roberts.

[Mr. Santana's prepared statement with attachments follow:]

PREPARED STATEMENT OF RONALD A. SANTANA, PRESIDENT, ASSOCIATION OF RETAIL TRAVEL AGENTS

My name is Ronald A. Santana and I am President of the Association of Retail Travel Agents (ARTA), a national association composed of over 1,800 appointed retail travel agencies located throughout the United States. We also have over 1,200 individual travel agents as members. I am also the owner of two travel agencies in the New York City area. In addition, I am an attorney admitted to practice in New York.

The term "retail travel agent" is defined by the Association to mean that the agent deals on behalf of its principle (carriers and other suppliers) with the public at large, rather than acting as a tour operator or tour packager (wholesaler). The typical travel agent (we use this term, though it must be recognized that there really are no two travel agents who are exactly alike) provides a wide range of services to the public in connection with domestic and foreign travel, and is an important part of our consumer oriented competitive system of commercial air transportation.

Travel agents are in the service business. Agents provide the client with particular and impartial travel related services that meet his or her needs. The client may have originated from the selling activity or, may have called upon the agent to meet a specific need.

Included within this role are all those services such as responding to questions on air arrival and departure, quoting air fares, etc., regardless of whether the person is an actual client. In fulfilling this role, the "agent" is, in fact, providing a key public benefit. Being the physical extension of the air carrier at the local point, he is the carrier's agent in the full sense of the word.

Travel agents also engage in the marketing, promotion and sale of air transportation services. These encompass all the promotional activities from media advertising to group organizing and selling the product. These activities can be termed incremental because in many cases, while the passenger may have traveled anyway, he or she very likely would not have traveled on that carrier, to that destination on that day.

Traditionally, the Association has pressed for changes in Conference rules that would enable individual agents to maintain a more competitive stance in the marketplace. In this connection, ARTA was the first association to demand that commission policies be taken out of Conference jurisdiction and be opened for individual carrier/agent negotiations. ARTA continues to maintain that all economic matters between the carrier and agent should be pursued through direct bilateral negotiations and not fall under Conference jurisdiction.

The Association has also consistently been committed to both open entry into the travel agency business and high professional standards.

Travel agent programs today are operated by the Air Traffic Conference (ATC) and the International Air Transport Association (IATA). Air carrier members of these organizations have entered into agreements which provide for the accreditation and joint appointment of travel agents throughout the United States. Most travel agents are accredited and appointed by both organizations. The joint appointment of travel agents offers major benefits to the public. Once a travel agent is appointed by either ATC or IATA, that travel agent represents all conference carriers participating in the program. Non-conference carriers who participate in the jointly sponsored and related standard ticket plan will have ready access to travel agent services. This means that the travel agent can arrange for travel on any participating airline. Thus, a traveller in Cincinnati, Ohio, or San Antonio, Texas, through a travel agent, has direct access at a single convenient location to air carriers operating in other parts of the country, e.g., Frontier Airlines or Aloha Airlines.

A passenger can make all of his or her air travel arrangements through a local travel agent and be assured of service. Travel agents are in a unique position to assist the public in making objective selections from available air transportation alternatives. Travel agents provide information on rates, routes and quality of service. With the proliferation of new carriers and routes following the 1978 Airline Deregulation Act the public has increasingly relied on travel agents. The entire system of competitive air transportation benefits from increased public access to information.

Properly conceived and well-administered industry-wide agency programs enhance the competition at the consumer level. This comes about because these industry-wide programs provide a speedy, and inexpensive means for the qualified individual entrepreneur to enter the travel agency business and represent the entire air transportation system. Similarly, an agency program provides all carriers, especially new carriers, with immediate national market penetration at minimal cost. Thus, both agents and carriers are in a better position to effectively compete in the marketplace. The joint agency programs have been of particular importance to new carriers trying to compete in established markets as well as established carriers trying to break into new markets. The benefits of these programs in terms of widespread consumer interest and the overall growth of the travel industry are already a matter of historic record.

It is important, however, to project into the future and briefly analyze the situation that would face the consumer if such industry programs were to end. Individual carriers in selecting their individual agents would most probably restrict the number of such agents dependent upon costs of selection and service, as well as other factors. Necessarily, smaller carriers would have fewer agents than larger carriers, and in both cases it is safe to assume that preferences would be given to the larger agents. The end result would be that smaller agents would then be forced out of business, and the total number of individually owned small travel agencies throughout the country would be reduced. Unlike today, not only would this limit public access to the various services provided by the agent, but it would directly limit public access to the various carriers. Additionally, because of the decrease in the amount of incremental business generated by even the smallest agents which fill otherwise empty seats, carrier revenues would be proportionately reduced and air fares would be proportionately increased.

We now have a transportation system which to a large degree depends on the interchangeability of carrier documents and various carrier interline agreements. The functioning of this system further depends upon the mutual selection and acceptance of the carriers' agency representatives. Absent such an industry-wide agency program, not only would the agent's ability to provide adequate services to his client be impaired, but also it is entirely probable that down-line carriers, especially those in foreign lands, would refuse to honor tickets written by agents with whom they had no working relationship. Even in an era of deregulation, commercial air transportation is different from other industries. The public needs and expects commercial aviation to function as an integrated system. Only through joint agency programs can the public have immediate access to the system. The jointly appointed agent is an integral part of the system. I do not believe that I am exaggerating in saying that there is a likelihood that the absence of a joint industry-agency program would result in the demise of the air transportation system as we know it today.

Travel agents are indeed agents of the carrier. They represent and act on behalf of each air carrier participating in the program. They are compensated by the carriers. When a travel agent issues an airline ticket, it will be honored by the carrier as if that ticket had been directly issued by the carrier.

Air transportation is a "big ticket" item. Access to an impartial agent representing practically all domestic and international air lines is of great importance to the traveling public. Because jointly appointed agents may represent all carrier participants in the ATC and IATA programs, they can provide impartial service. If the joint agency programs are allowed to terminate, they would likely be replaced by a system of individual appointments, and the impartiality that the public now expects would be gone.

The joint agency appointment system is of critical importance with regard to international air travel Not only are travel agents for every domestic carrier by virtue of the ATC appointment, if those agents also have IATA appointments, they can book passage on international carriers all over the world. Thus, a traveler can deal with his or her local travel agent and make complete arrangements for international travel without having to deal with dozens of carriers on an individual basis. That traveler in Cincinnati has the same access to international air carriers by virtue of the travel agency program as does the traveler in New York City.

Public satisfaction with the convenience and service provided by travel agents has been well documented. In 1975 the Association for Retail Travel Agents (ARTA), the American Society of Travel Agents (ASTA), the American Automobile Association (AAA), the Association of Bank Travel Bureaus (ABTB), American Express Company, and air carrier groups sponsored an objective study of the travel agent industry by the independent firm of Touche Ross and Company. In 1978 Touche Ross and Company issued its detailed report.[1] The report included the results of a sophisticated survey of 2,000 air travelers. Travel agents received "high ratings on the quality of the services performed." Pertinent portions of the report are appended hereto. That study continues to be regarded as the most accurate and objective view of the travel agent industry as seen by the traveling public now available.

Public dependence on travel agents has increased greatly since passage of the Airline Deregulation Act of 1978. New air carriers have been formed, new routes are being flown, and there is a wide variety of fares available to the public. Through local travel agents, the public now has access to over 14,000 commercial flights originating each day at U.S. airports. The public is making greater use of travel agents to help sort out the ever increasing number of air travel options available.

Not only does the joint agency appointment system provide the public with access to a large number of carriers at a single location, it provides each participating air carrier with over 21,000 marketing outlets throughout the United States.

These travel agency outlets not only provide convenience to the public, they promote air transportation. The 1978 Touche Ross study documents that travel agents promote air transportation and tourism. The full range of agent activities is discussed in the pertinent portions of the Touche Ross report appended hereto. The United States has the best and most extensive system of air transportation anywhere in the world. Travel agents are an important part of our integrated system of commercial air transportation. They are important to the interline system, under which a passenger can secure co-ordinated through transportation on any number of connecting air carriers.

The Airline Deregulation Act of 1978 was passed for the purpose of allowing greater competition between commercial air carriers. The travel agent system has been instrumental in promoting that competition. When a new carrier becomes certified or an existing carrier begins operation on a new route, that carrier through the existing network of travel agents can immediately market that new service throughout the United States. Small air carriers with limited resources are in a position to market their service directly to the public on the same basis as larger and more powerful air carriers. Not only does the traveller in Cincinnati have access to Aloha Airlines through the travel agency system, but Aloha Airlines can market its service throughout the United States by participating in the joint agency program.

Travel agents provide an important public service in assisting the public in selecting from among the ever increasing number of air travel options. Competition is most effective when the public has easy access to what is being offered at what price. Joint travel agency programs have helped to make competition between the air carriers more effective than it would be in the absence of these programs.

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[1] For the convenience of the subcommittee, the summary concerning agency activity is attached as appendix 1 and the summary of the air traveler survey is attached as appendix 2.

In order for a travel agent to be accredited by ATC or IATA, certain minimal standards must be met. These standards are intended to insure that a new travel agent has a minimum of knowledge and experience in order that the public can be adequately served. It is important to note that the Justice Department conceded to the Civil Aeronautics Board in its closing argument in the Competitive Marketing Investigation that the standards are reasonable and do not unduly restrict entry into the travel agency business. As common carriers, the nation's airlines must accurately represent to the public the service they hold themselves out to perform. Travel agents are the legal extension of the carrier and bind the carrier to provide service as if the carrier itself had written the ticket. Air transportation should not be treated the same as durable consumer goods. A spoiled vacation cannot be returned to the store for a refund like a defective toaster. We believe that a system which allows for reasonable standards for the accreditation of travel agents and which do not unduly restrict entry into the field are clearly in the public interest.

If deregulation is to reach its desired conclusion, it is absolutely necessary for the public to have access to proper information. Only the maintenance of some reasonable qualification standards for those dealing with the public can provide this safeguard. As competition makes the system more complex with more fare and other options being offered, the maintenance of such standards becomes even more important.

Having standards for the appointment of travel agents also serves another important function. Over 95 percent of all travel agents are small businesses; and over half are owned or managed by women. Approximately 12 percent are "minority" owned. Because it is essentially a service business, capital requirements are relatively small. The typical ARTA member travel agency has from 3 to 5 employees and the owner is usually a working agent. Although the failure rate for new small businesses generally is quite high, the Small Business Administration has indicated that the failure rate for new travel agencies is relatively low. Requiring some knowledge of and experience in the travel business prior to accreditation as an agent not only improves service to the public, it increases the success rate of those small businesses.

The termination of joint agency programs will require each agent to separately seek an appointment from each carrier. This will substantially increase the costs of entry and lead to a high degree of concentration. The public will no longer have available the same range of services in local travel agencies.

Any suggestion that accreditation standards have in any way limited entry as plainly belied by the statistics. The number of accredited travel agents has more than doubled in the last 10 years. Over 500 new agency locations have been added so far in 1983. There are now more than 21,000 travel agencies located throughout the United States and they account for over 60 percent of domestic airline ticket sales and over 75 percent of international ticket sales. In recent years there has been a large increase in the number of travel agencies; and no one seriously suggests that the standards requirement serves as a bar to entry.

The ATC and IATA joint agency programs were thoroughly analyzed in the Civil Aeronautics Board Competitive Marketing Investigation. There were weeks of hearings filling thousands of transcript pages, piles of documentary evidence, and exhaustive briefs. Administrative Law Judge Yoder presided at the hearings, reviewed all of the evidence and issued an initial decision. Essentially, Judge Yoder found that the joint agency programs served the public well and were not unduly anticompetitive. Indeed, because of the market access given new carriers through the program and the ease of entry into the agency business, the programs were actually competition enhancing.[2]

Judge Yoder did not give the existing programs his unqualified blessing. His decision would eliminate or modify numerous features of the agency programs thought to be unduly restrictive or unnecessary. For example, the initial decision would have enabled restrictions on agency locations. Moreover, the initial decision specifically provided for non-agent marketing outlets in addition to appointed travel agents. Other suggestions for change, including some from ARTA, were rejected by Judge Yoder.

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[2] The courts have recognized that joint industry agreements which might at first appear to be anticompetitive may in actual operation promote competition. See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. 441 U.S. 1, 16-23 (1979); United States v. Realty Multi-List, Inc., 629 F2d 1351, 1366-1369 (5th cir., 1980).

The initial decision would have approved the agency agreements as modified and granted the necessary antitrust immunity under sections 412 and 414 of the Federal Aviation Act. On balance, it represents a reasoned compromise acceptable to ARTA and others in the travel industry.

On review, the Board rejected Judge Yoder's decision and issued a final decision that would effectively terminate all joint agency programs at the end of next year. The Board acted principally at the urging of its staff and Justice Department lawyers. Although a number of groups requested modification of the Yoder decision, the only non-government group to oppose the concept of an approved industry-wide agency program was the National Passenger Traffic Association (NPTA), an organization comprised of large corporate travel departments.

For many years NPTA has been attempting to require that the carriers accredit corporate travel departments and pay commissions as travel agents. However, as Judge Yoder found, corporate travel departments are buyers of air transportation, not agents of the seller. Moreover, under the Airline Deregulation Act of 1978, corporate travel departments may lawfully negotiate directly with air carriers for special fares, discounts, and rebates. As a practical matter, corporate travel departments may now obtain the economic advantage they have been seeking for many years. It is difficult to understand why NPTA continues to seek the demise of the agency programs in their entirety.

NPTA is not satisfied that its members may now obtain economic advantages by direct negotiations with the carriers. It wanted the Board to require that its members receive an economic advantage not available to others in the form of commissions. Absent agency programs, the majority of travelers not represented by corporate travel departments would be the losers.

We strongly urge this subcommittee and its members to support H.R. 2053, "the Air Travelers Security Act of 1983." This bill would adopt the decision of Judge Yoder as the final decision in the Competitive Marketing Investigation. It would allow for the continued approval and antitrust immunity under Sections 412 and 414 of the Federal Aviation Act for the industry-wide travel agency programs.

Absent this legislation, the joint programs will surely die. Numerous carriers have made it clear that they would not participate in any joint agency programs without government approval and antitrust immunity. The risk of an antitrust action either by the Department of Justice or a private plaintiff is simply too great. The large carrier, those in the best position to market their service without an agency program, would likely be the first to withdraw. And, without the large carriers, the program would become meaningless. In addition, the risk of an antitrust suit to a travel agent is horrendous. The cost of defending such an action, even a frivolous one, could be enough to bankrupt most small businesses.

The joint agency programs allow for an ongoing dialog between carriers and agents. Representatives of ARTA and other trade associations of travel agents regularly meet with representatives of carrier organizations to discuss matters of common concern arising under the agency agreements. These joint working sessions allow for the smooth running of the program. Antitrust immunity is necessary for this dialog to continue. Without such immunity association officials and others would be reluctant to participate in any industrywide program. The fear of an antitrust action is real and would effectively lead to the termination of programs that serve the public well.

Existing travel agency programs are of particular importance to small businesses, and we believe they should be retained. We strongly urge passage of H.R. 2053.

Appendix 1

C. AGENCY ACTIVITY SURVEY

The retail travel agency industry provides direct and indirect services to the airlines and the traveling public in many ways other than from the issuance of airline tickets. In order to provide measures of some of these benefits, a survey of agency activities was conducted in conjunction with the sample agency visits for the economic study. The activity survey information was obtained through the use of a questionnaire interview with the agency owner or manager. The personal visits to the agency took place on a random basis for the period between November 15, 1976 and November 12, 1977.

1. Agency Promotional Activities

The airline industry receives some benefit from the activities that agencies engage in to promote themselves and their travel products. A list of 18 specific promotional activities was developed for analysis. During the first agency visit each owner or manager was asked which of these activities the agency had engaged in during the preceding year. For each activity that the agency did engage in, we inquired as to the volume of that activity during the preceding 30 days. The monthly volume question was repeated on the second visit, and the results averaged, so as to avoid any bias from seasonal variations.

Exhibit A-9 presents the results of this survey of agency promotional activities. The amounts represent estimates by agency owners and managers and were not subject to independent verification by Touche Ross & Co. The promotional activities have been grouped according to activity category. The exhibit indicates, for example, that 79% of the agencies said they had taken out newspaper advertisements in the past year. For those agencies that did use advertisements, the average monthly number of advertisements was 5, based on the estimates of the agency owners and managers.

2. Other Service Measures

Various other service measures were also developed based on the economic study and the agency interviews. Approximately 4.9% of travel agency cost, representing an estimated $46 million for the industry, was used for advertising expenditures.

The number of travel agencies has more than doubled since 1968, going from 6,021 in 1968 to 13,454 at the end of 1977, thereby providing more outlets for the public. Approximately 26% of current agencies have been in business for more than 15 years.

The majority of travel agencies (56%) are open on weekends. More than 80% are open to the public more than 40 hours a week.

The industry has a base of experienced personnel. The agency sample indicates that the following proportion of agency employees have worked in their current agencies for more than 5 years: owners, 53%; managers, 43%; and agents, 17%.

Most agencies (71%) put together their own group tours, with an average of 8 group tours developed per year and an average of 50 people per tour.

EXHIBIT A–9

AGENCY PROMOTIONAL ACTIVITIES

	PERCENT OF AGENCIES WITH ACTIVITY	AVERAGE MONTHLY VOLUME FOR AGENCIES WITH ACTIVITY IN PAST YEAR	
MASS MEDIA			
NEWSPAPER ADVERTISEMENTS	79%	5	ADVERTISEMENTS
RADIO COMMERCIALS	41	13	COMMERCIALS
PRINT MEDIA INTERVIEWS OR ARTICLES	33	.4	INTERVIEWS OR ARTICLES
TV COMMERCIALS	13	2.8	COMMERCIALS
RADIO AND TV SPEECHES	10	.5	SPEECHES
BILLBOARDS	5	1.2	BILLBOARDS
COMMUTER ADVERTISING (BUS, TRAIN, ETC.)	2	.5	POSTERS
DIRECT ADVERTISING			
TRAVEL BROCHURE DISPLAYS	94%	190	BROCHURES ON DISPLAY
LOCAL TELEPHONE DISPLAY ADS	83	2.5	DIRECTORIES
DIRECT MAILINGS (TRAVEL LITERATURE, NEWSLETTERS)	71	870	PIECES MAILED
MISCELLANEOUS PRINTING (CALENDARS, PROGRAMS, ETC.)	57	280	PIECES PRINTED
WINDOW DISPLAYS	50	.8	CHANGES OF DISPLAY
VIDEO DISPLAYS	11	1.6	VIDEO DISPLAYS
PERSONAL PROMOTIONAL EFFORTS			
DISTRIBUTION OF PASSPORT WALLETS, BAGGAGE TAGS, ETC.	80%	100	PIECES DISTRIBUTED
SPEECHES TO COMMUNITY GROUPS	62	.6	SPEECHES WITH AN AVERAGE AUDIENCE OF 77 PEOPLE
CONTACT OF COMMERCIAL ACCOUNTS TO SELL PERSONAL TRAVEL	40	10	COMMERCIAL CUSTOMERS CONTACTED
BON VOYAGE AND OTHER TRAVEL PARTIES	34	.7	PARTIES WITH AN AVERAGE PARTY SIZE OF 46 PEOPLE
TELEPHONE SOLICITATION OF POTENTIAL CUSTOMERS	27	28	POTENTIAL CUSTOMERS CONTACTED

Appendix 2

D. AIR TRAVELER SURVEY

1. Introduction

This section presents a summary of the study findings for the air traveler survey. The findings are based on telephone interviews conducted from April 1977 to March 1978, with 2,000 air travelers who had taken at least one trip on a scheduled passenger airline within 12 months of the interview date. The objective of the study was to measure the value of travel agent services to consumers and to the airlines. More specifically, the study sought to:

- Determine the characteristics of the air travel market, i.e., traveler demographics, trip characteristics, services provided and overall ratings of services, reasons for using services, and influence over travel plans.
- Compare the differences in these characteristics which exist in the air travel market between travel agents and airlines.
- Identify characteristics of specific segments of the market, i.e., those who travel for business, vacation and other personal reasons, the frequent traveler and the international traveler, and to compare differences in these travelers dependent upon whether they used a travel agent or an airline to make their arrangements.

The approach used in this survey was to focus specifically on the last trip taken by the traveler. Respondents in the continental U.S., over eighteen years old, were asked to recall their last air trip and respond to survey questions based on this specific trip. This approach was used to avoid generalized responses and to assure more precise responses related to a specific experience. The respondents were divided into two groups: those who used a travel agent to make travel arrangements and those who made their arrangements directly with the airlines. This approach allowed for direct comparisons to be made between travel agents and airlines. In addition, it should be noted that much of the study deals with consumers' perceptions of travel agents and airlines. This aspect is particularly important when analyzing questions dealing with reasons for using services, ratings of services and the influence that travel agents and airlines have on travel plans.

The results of the survey are presented without any weighting of the responses. Rather than weighting the results by the responses given by a particular traveler type, such as frequent traveler, the response of several types of travelers are considered separately. Therefore, users of the report may focus on the traveler type(s) of greatest interest.

Our approach was to analyze the data and present the findings of the survey using several strata of the same sample base as follows:

- Average traveler. The total sample is reported as the average traveler.
- Business, vacation and personal traveler. The segment or strata of the sample which included the respondents of the survey who defined the purpose of their trip as business, vacation or other personal reasons. If the trip was partially business and partially vacation the respondent was required to indicate the primary purpose of the trip and was categorized according to the response.
- Frequent traveler. The strata of the sample which included the traveler who took six or more trips within a year of the interview date.
- The international traveler. The strata of the sample which included the respondent who indicated that he was traveling outside of the continental United States (this would include trips to Hawaii, Alaska, Puerto Rico, etc.).*
- Geographic Region. The strata of the sample which categorized the respondents by the region of the U.S. in which they reside. (See Exhibit A-21 for a listing of regions by states.)

Using these stratifications for presenting our results, the data collected was summarized in tabular form and is presented as exhibits throughout this section of the report. A summary of the findings of the air travel survey is presented in the balance of this section. These findings have been divided into six subsections, including:

2. Overall Findings
3. Selected Traveler Demographics and Trip Characteristics
4. Measures of Trip Complexity
5. Influence on Travel Plans
6. Other Findings According to Residence
7. Overall Ratings of Services

A more comprehensive treatment of all the study findings is available in the detailed study report.

* It should be noted that the sample size of those travelers who made arrangements for international trips through the airlines is smaller than desirable. Therefore, the results related to this group should be interpreted with care.

2. Overall Findings

In general, the results of the study indicate three key study findings. These are:

1. Travel agents and airlines are essentially serving two different segments of the air travel community. Travel agents tend to handle trips of greater complexity while airlines deal primarily with travelers who require less complex arrangements.
2. Travel agents have a greater degree of influence on the travelers' final travel plans than the airlines.
3. Both travel agents and airlines receive high ratings on the quality of the services performed for their respective markets.

As stated above, the first key study finding indicates that there are differences in the complexity of the trips handled by a travel agent and those handled by the airlines. This complexity can be measured in several ways:

- The reasons given for using travel agent or airline. The reasons given for using a travel agent or airline may be indicative of the traveler's service requirements.
- The amount of time spent arranging trips. The fact that more time is required to make travel plans is another indicator of trip complexity.
- The number of services provided to travelers. Most trip arrangements include writing an airline ticket and making an air reservation. However, certain travelers often require additional services such as hotel reservations, car rentals, itineraries, etc. We made a general assumption that the more services required, the more complex the trip.
- The degree of uncertainty in travel plans. If travelers have not made travel decisions prior to contacting the travel agent, assistance will be given to help travelers finalize their plans. The more components which are undecided, the greater the service required.

Although each of these measures individually may not represent a conclusive measure of trip complexity, considered as a group they are appropriate measures of complexity and offer additional insights into the air travel market. This study shows that travel agents, as compared to the airlines, provide more services to every type of traveler surveyed, deal with travelers who are more uncertain about travel plans, and spend more time arranging trips. In addition, travel agents handle more international trips which tend to be more complex than other types of travel.

These results lead to the conclusion that the air travel market is divided into two very distinct segments. One segment is comprised of travelers who are primarily concerned with speedy arrangements and have low additional service requirements. This group tends to deal directly with the airlines. The second segment has diverse and high level service requirements and tends to deal with travel agents.

As indicated above, the second and third key study findings relate to the influence that travel agents and airlines have on travel plans and the overall ratings of services provided. For purposes of this study, influence is measured by the ability of travel agents and airlines to change or impact specific travel decisions. The overall ratings given by air travelers to services provided is an indication of consumer satisfaction with travel agents and airlines, and the quality of services provided by them.

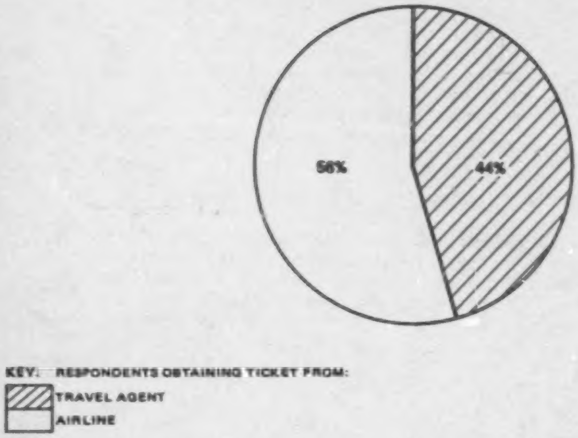
3. Selected Traveler Demographics And Trip Characteristics

The survey sample was divided into two major categories: those who used a travel agent to make trip arrangements and those who used an airline. Exhibit A-10 shows that 56% of the air travel population made their travel arrangements directly with the airlines, while 44% used travel agents. Further, the study focused on traveler demographics and showed that, as a group, travelers who used a travel agent for their last trip are older and have a higher median income. The results of the survey indicate that:

- Median Age. The median age of the average traveler is 42 years. However, the median age of those travelers using a travel agent is 46 years old, whereas airline users have a median age of 39.
- Median Income. The median income of the average traveler is $22,150. Travel agent users' median household income is $24,300 while travelers using an airline have a median income of $20,500.
- Occupation. A somewhat greater percentage of travel agent users have professional and managerial positions. Forty-nine percent of travel agent users are in professional and managerial positions, while 44% of those using an airline are in this type of occupation.

EXHIBIT A-10

TRAVEL AGENT/AIRLINE COMPARISON
TOTAL SAMPLE SURVEYED
SOURCE OF AIRLINE TICKET

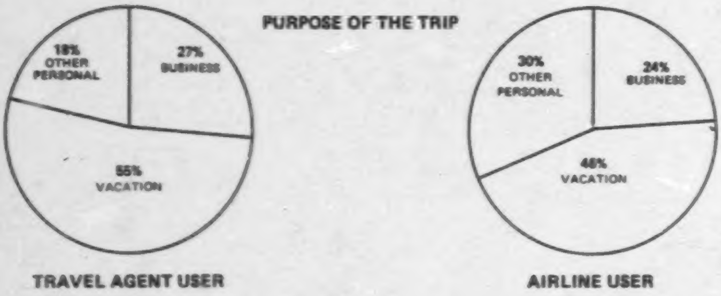


In addition, the survey focused on selected trip characteristics. Travelers were asked to indicate the purpose of their trip, how many trips they had taken within a year of the inteview date, and the destination of their last trip. The results shown on Exhibit A-11 demonstrate the following:

- Purpose of Trip. A greater portion of travel agent arranged trips are vacation trips, whereas airlines arrange more trips for travelers who said the purpose of their trip was for personal reasons (not related to business or vacation). Approximately one quarter of trips arranged by both travel agents and airlines are for business purposes.
- Destination. Twenty-five percent of the trips arranged by travel agents are international, whereas airline arranged trips to international destinations represent only 7% of all trips.

EXHIBIT A-11

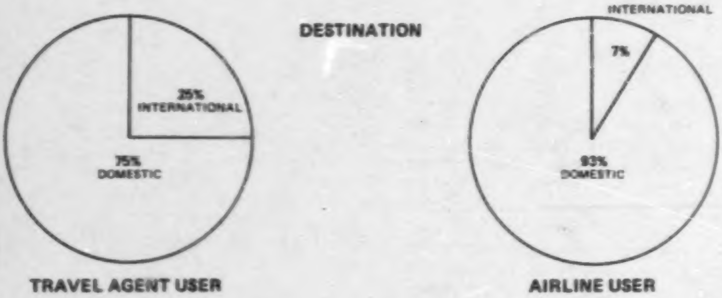
TRAVEL AGENT/AIRLINE COMPARISON SELECTED TRIP CHARACTERISTICS*



PURPOSE OF THE TRIP

TRAVEL AGENT USER

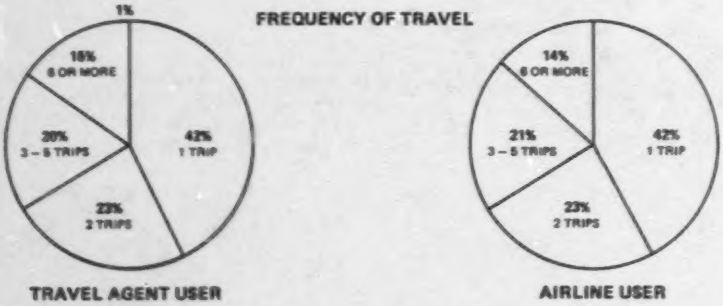
AIRLINE USER



DESTINATION

TRAVEL AGENT USER

AIRLINE USER



FREQUENCY OF TRAVEL

TRAVEL AGENT USER

AIRLINE USER

*Based on number of travelers responding.

- Frequency of Travel. Frequency of travel is approximately the same for all travelers regardless of whether their trip was arranged by a travel agent or an airline. Most travelers take only one trip per year, whereas about 15% are frequent travelers, i.e., take 6 or more trips per year.

4. Measure of Trip Complexity

The findings of the survey indicate that there is a significant difference in the complexity of trips arranged by travel agents and airlines. The conclusions that can be drawn from an analysis of the data show that travel agent arrangements tend to be more complex than airline arrangements and that to the extent that travel agents are able to service travelers who have greater service requirements, the travel agency industry is providing value to both consumer and the airlines. The survey measures trip complexity in several ways:

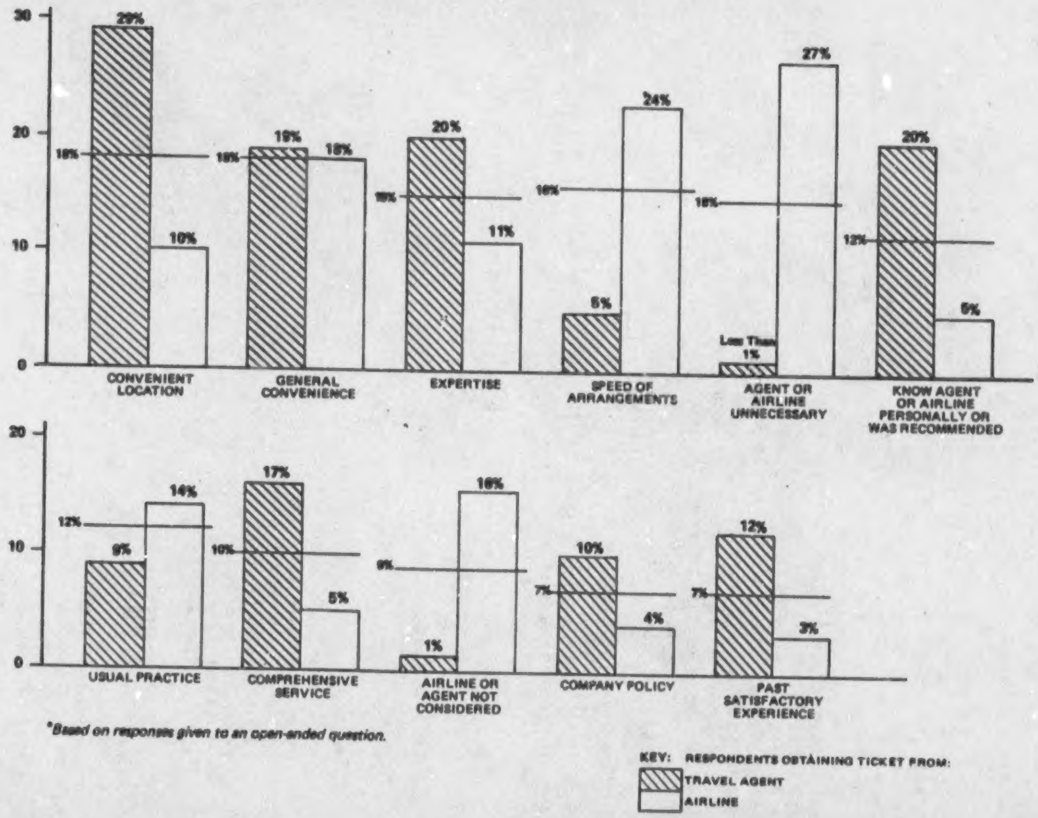
- Reasons given for using travel agencies or airlines
- Time spent arranging the trip
- Service provided
- Degree of uncertainty in travelers' plans at the time of initial contact.

(a) Reasons For Using a Travel Agent or Airline

Respondents were asked, in an open ended manner, to state what reasons they had for deciding to use a travel agent or airline. Exhibit A-12 shows the reasons which were mentioned most frequently and demonstrates that there are significant differences in reasons given depending upon whether the trip was arranged by a travel agent or an airline. The reasons given by travel agent users as being most important are convenient location, convenience in general, expertise, or that the traveler knew the agent personally or was recommended. Airline users said that the most important reasons for dealing directly with the airline were that the agent was unnecessary and that the airline could provide the traveler with speedy arrangements.

The reasons given by travel agent and airline users are indicative of the differing requirements and trip complexities of these travelers. The importance given to the location of a travel agent is supported by other findings which indicate that travel agency users tend to make travel arrangements in person, allowing them to pick up airline tickets locally and to meet with the agent to discuss travel arrangements. Reasons given by airline users as

TRAVEL AGENT/AIRLINE COMPARISON
REASONS FOR USING TRAVEL AGENT OR AIRLINE*



*Based on responses given to an open-ended question.

EXHIBIT A-12

important include speed of arrangements and that the agent is unnecessary. This suggests that this group may not require the additional services offered by the agent and that these travelers feel their trip can be more quickly and directly handled by dealing with the airlines.

As shown in the previous exhibit, "to obtain local ticket pickup" and "convenience of location" were not as important reasons for airline users as for travel agent users. Further questioning on this issue was done to determine if having a city or airport ticket office in the traveler's vicinity (either near work or residence) affected the traveler's decision to use an airline or travel agent. Exhibit A-13 shows that 61% of the sample said they work or live near an airport or city ticket office. Of this group, 61% make travel arrangements through airlines. However, 54% of the travelers who said they do not live near an airport or city ticket office (25% of the sample) make arrangements with a travel agent. These findings indicate that even though airline users may not have said that convenience of location and local ticket pickup are as important to them as to travel agent users, the proximity of an airport or city ticket office appears to result in travelers more often making arrangements directly with the airlines.

(b) Time Spent Arranging Trip

Travelers were asked to estimate how much time the travel agent or airline spent working with them to arrange their trip. Exhibit A-14 presents the results which are summarized below:

- On the average, travel agents spend almost twice as much time to arrange trips as do the airlines.

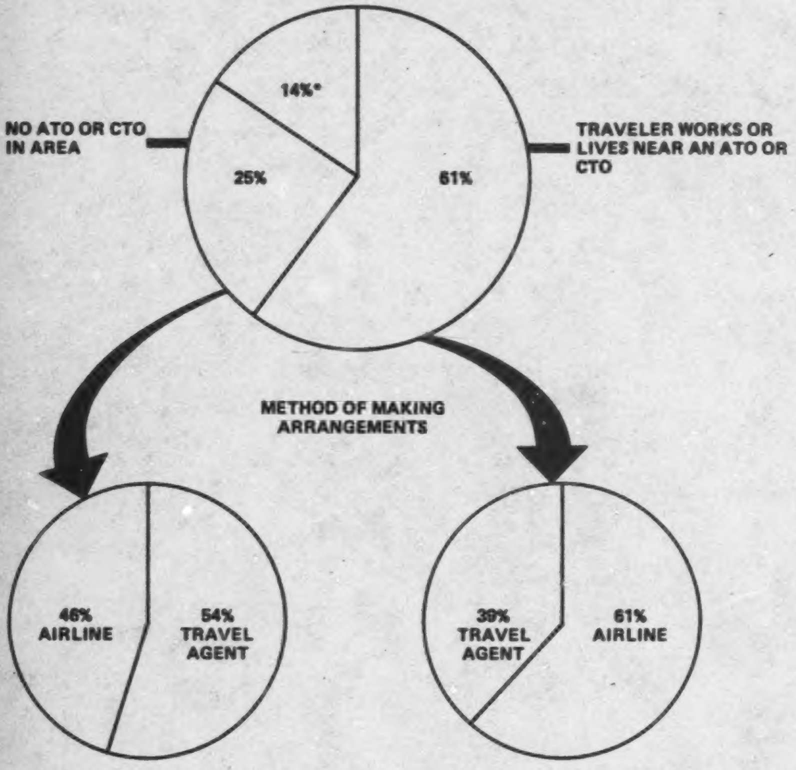
- Airlines spend approximately the same time arranging all types of trips except for international trips which take about twice as long to arrange.

- There is a great deal of variability in the amount of time spent by travel agents to arrange trips depending upon the type of trip arranged. Travel agents spend between 16 and 19 minutes arranging trips for business travelers, frequent travelers, and those who travel for personal reasons. However, 35 minutes are spent with vacation travelers on the average and 65 minutes with international travelers.

Although the amount of time spent arranging trips could be affected by the efficiency of the individual making the arrangements, the fact that overall travel agent users said more time was spent with them, and the fact that there is a large variability in time spent dependent upon the type of trip arranged by a travel agent suggests that, on the average, the trips handled by travel agents may be somewhat more complex or that their transactions are handled on a more interpersonal basis.

EXHIBIT A-13

TRAVEL AGENT/AIRLINE COMPARISON
OTHER REASONS FOR USING A TRAVEL AGENT OR AIRLINE LOCATION OF AIRLINE OR CITY TICKET OFFICE

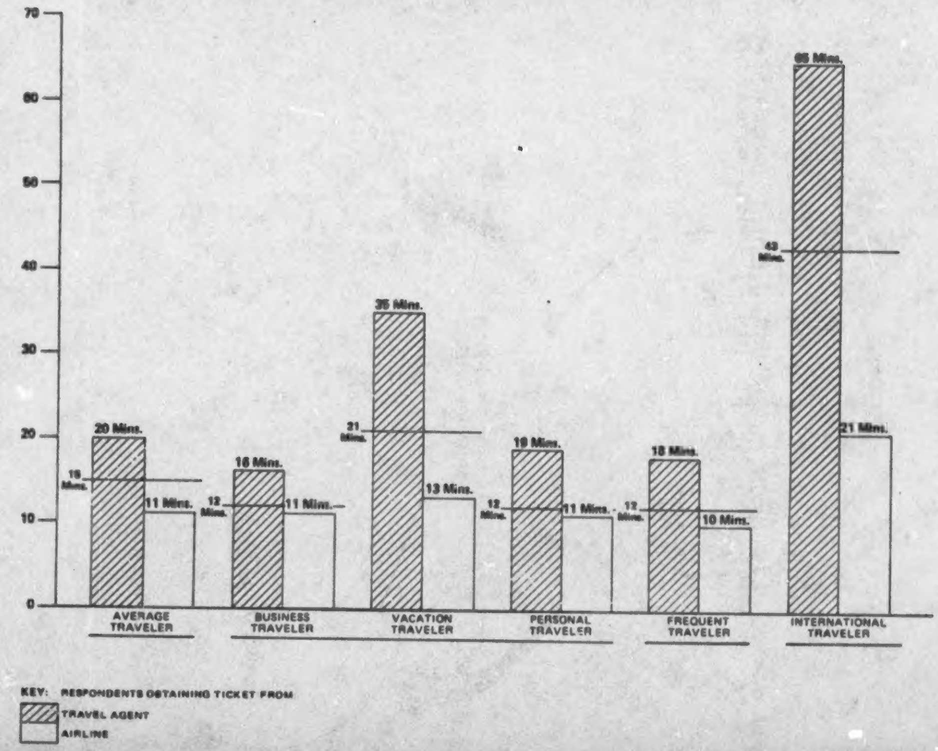


*No answer or don't know.

EXHIBIT A-14

TRAVEL AGENT/AIRLINE COMPARISON

MEDIAN TIME SPENT ARRANGING TRIP ACCORDING TO TRAVELER TYPE



(c) Services Provided

Respondents were asked to indicate which services (from a list of 15 specified services) were provided to them on their last trip. Exhibit A-15 shows the responses given by the total sample. As shown on the exhibit, over 90% of the respondents said that the travel agent or airline wrote the ticket and made the reservations. Approximately 10% of the respondents said that the travel agent or airline did not provide both these services. In some instances the airline (travel agent) wrote the ticket that was reserved by the travel agent (airline). Other than these two services the findings show that in every case (with the exception of the service, "sell travel or baggage insurance") travel agents provided services to a greater number of their users than did the airlines. More than 15% of travel agent users said that they were provided with the following services: hotel reservations, itineraries, travel packages, car reservations, and maps and guidebooks. None of the services specified were provided to a comparable percentage of airline users. However, airlines did provide 10% of the respondents with post-trip assistance and 13% were provided with travel or baggage insurance.

Exhibit A-16 shows the average number of specified services provided to various types of travelers. This average is a relative measure of the number of services provided and is not meant to imply that the services which were specified are of equal value to travelers or that they require equal effort on the part of travel agents or airlines. The exhibit shows that the average traveler, as indicated by the results of the total sample, obtains 2.95 services. However, if the traveler used a travel agent to make arrangements, more services tend to be provided. The travel agent user obtains an average 3.62 services, whereas airline users obtain 2.40. Further, the exhibit illustrates that the most services, 5.43, are provided to international travelers, and 3.41 to vacation travelers. The individual traveling for personal reasons receives 2.37, the fewest number of services.

The findings indicate that, regardless of the purpose of the trip, frequency of travel, or destination of the trip, if a traveler requires additional services, there is a tendency to use a travel agent. If the trip is less complex, the traveler tends to make arrangements directly with the airlines.

(d) The Degree of Uncertainty in Travel Plans

If travelers have not made travel decisions prior to contacting the travel agent or airline, assistance will be given to help travelers finalize their plans. For example, often travelers contacting a travel agent or airline must not only decide about the air portion of the trip, but must also decide about hotel

EXHIBIT A-15

TRAVEL AGENT/AIRLINE COMPARISON
SERVICES PROVIDED

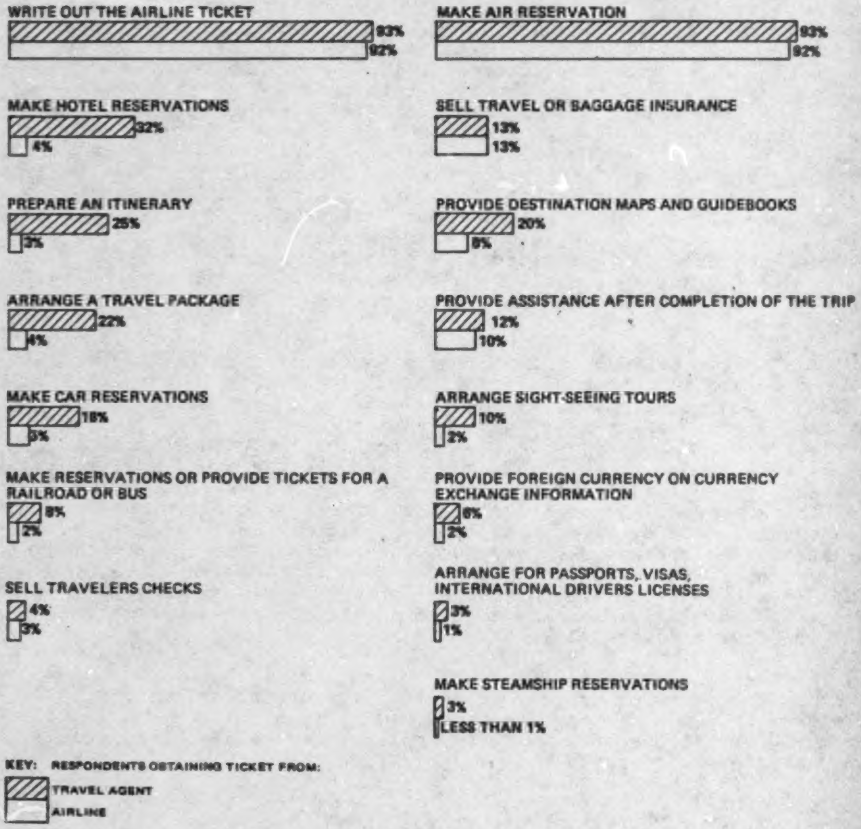
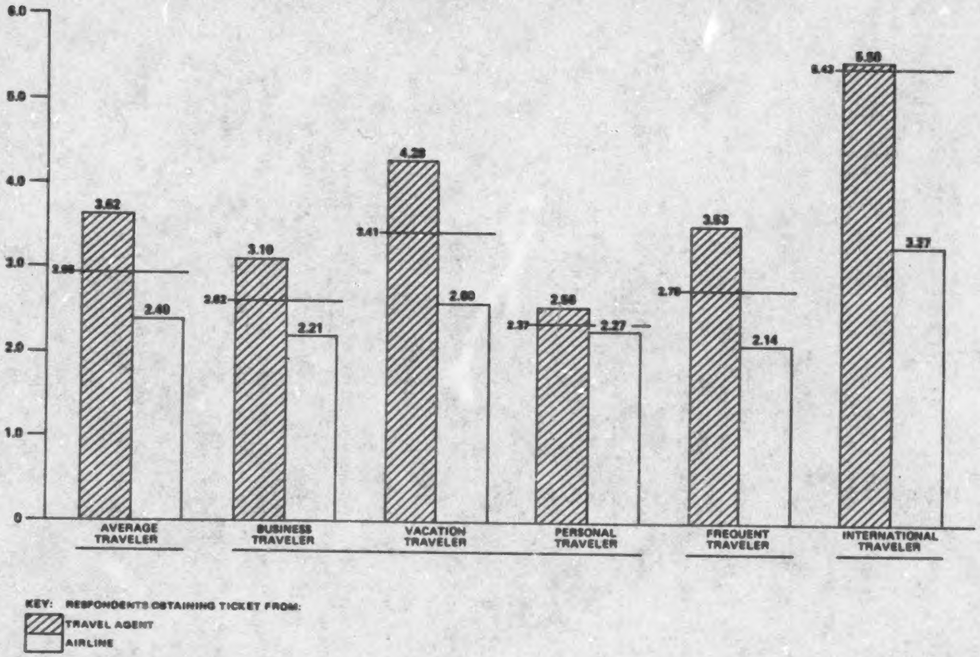


EXHIBIT A-16

TRAVEL AGENT/AIRLINE COMPARISON

AVERAGE NUMBER OF SERVICES PROVIDED ACCORDING TO TRAVELER TYPE



accommodations, tour arrangements, car rentals, etc. Generally, the more components which are undecided, the more complex the trip and the greater the service required. Therefore, the number of trip components which are undecided at the time the travel agent or airline is contacted has been used in the study as another indicator of the complexity of the trip.

The study included several questions to determine the degree of uncertainty in travelers' plans at the time they initially contacted the travel agent or airline. Travelers were asked to indicate, from a list of specified trip components, e.g., choice of a particular airline, choice of a hotel, where to go (a complete trip component listing is shown on Exhibit A-19), whether they had made decisions about these elements of their trip prior to contacting the agent or airline.

The results of these questions are shown on Exhibit A-17. As demonstrated in the exhibit, of the list of 13 trip components, travelers were, on the average, undecided about 2.21 components at the time they initially contacted the travel agent or airline. However, travelers making travel arrangements through a travel agent were uncertain about more components of the trip (2.78), whereas airline users were undecided about only 1.77 components. It is also shown that international travelers and vacation travelers are uncertain about more components of their trip than other traveler types. Business travelers and frequent travelers are least undecided. Finally, the personal traveler is equally undecided regardless of whether a travel agent or airline is used.

5. Influence on Travel Plans

The consumer value survey included a question which focused on the influence that travel agents and airlines had on the travelers' trip plans. The questions dealt with a variety of trip components (shown on Exhibit A-19), and asked travelers, dependent upon whether they were predecided or undecided about specific trip components, whether recommendations made by the travel agent or airline representative had either changed or influenced their decisions. Specifically, the purpose of the questions were:

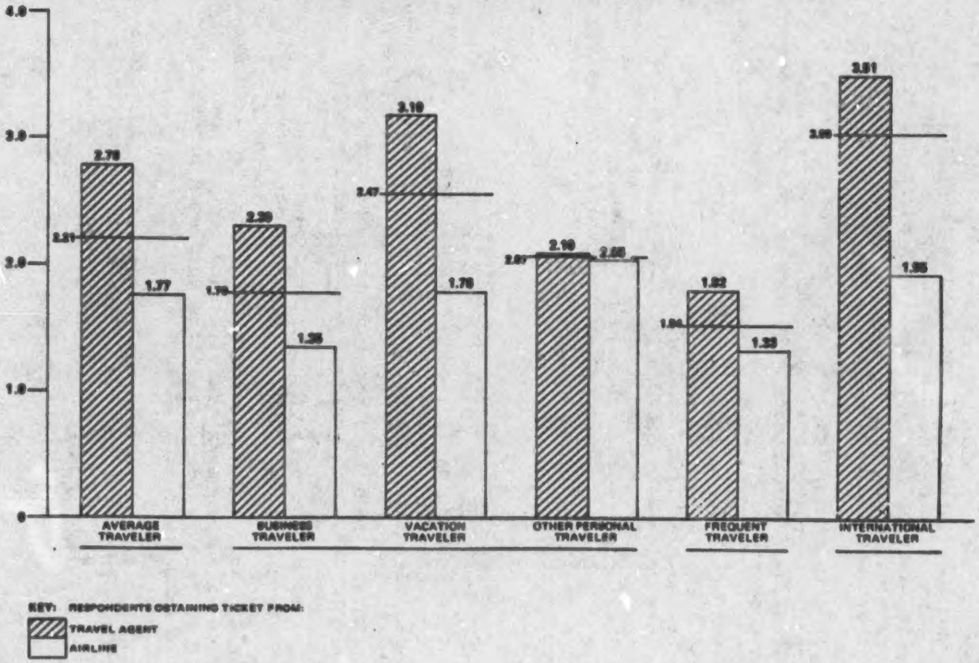
- To determine, when decisions about trip components have already been made (predecided) at the time of contact, if these decisions are changed as a result of travel agent or airline recommendations.

- To determine, when decisions about trip components have not already been made (undecided), if the airline or travel agent was able to influence the final decision.

EXHIBIT A-17

TRAVEL AGENT/AIRLINE COMPARISON

AVERAGE NUMBER OF TRIP COMPONENTS UNDECIDED AT THE TIME OF INITIAL CONTACT



The average percent of undecided trip plan components which were influenced (either greatly or somewhat) has been computed for each type of traveler. The results are shown on Exhibit A-18, which shows that travel agents have approximately twice as much influence over their users' plans as do the airlines. Agents are able to influence 27% of the trip components which are undecided at the time of initial contact whereas airlines are only able to influence 15%. Further, the most influence is on international plans, vacation plans and plans of frequent travelers. The least amount of influence is exercised on business travel plans and trips for personal reasons. Finally, the personal traveler is almost equally influenced by travel agents and airlines.

If trip components have been decided prior to the initial contact, both agents and airlines have minimal influence in changing travelers' plans. Approximately 3% of the time predecided travel plans are changed.

Exhibit A-19 presents detailed analysis of the influence agents and airlines have on each component of a trip. The percentages shown are the total of respondents stating that they had changed plans which were decided prior to contacting the airline and respondents who said they had not decided about specific components and were influenced, either greatly or somewhat, by the travel agent or airline. Note that a greater amount of influence exists over choice of a particular airline, time of day to travel, and choice of hotel accommodations.

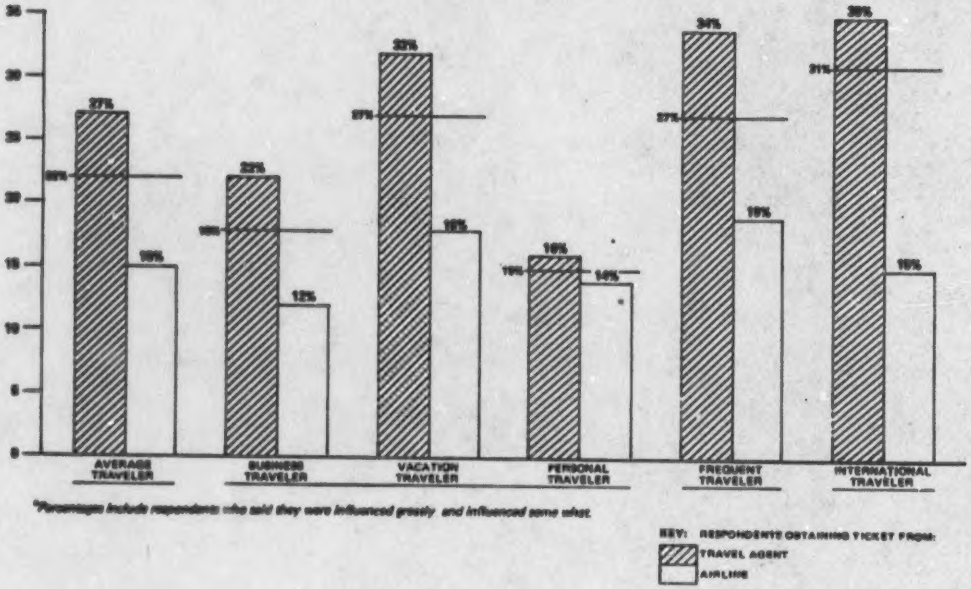
6. Other Findings - According to Residence

This subsection of the report analyzes the selected findings of the survey according to the location of the respondents. As shown in Exhibit A-20, the comparative number of travel agents in different regions of the U.S. varies greatly. The Northeast and the West have the largest number of travel agents per 100,000 population, 8.15 and 7.14 respectively, whereas the Central and Southern region have the fewest. This finding is supported by the results of the survey. Exhibit A-21 shows that the number of travelers using a travel agent to make arrangements varies depending upon the region of the country in which the traveler resides. Approximately 50% of all travelers living in the Northeast and West use a travel agent to make travel arrangements. However, in the South and Central regions, travelers tend more often to use an airline to make their arrangements.

Exhibit A-22 reports the results of the questions dealing with services provided, and the influence travel agents and airlines have on travel plans. The conclusions which can be drawn from these exhibits are as follows:

TRAVEL AGENT/AIRLINE COMPARISON

AVERAGE PERCENT OF UNDECIDED TRIP COMPONENTS INFLUENCED



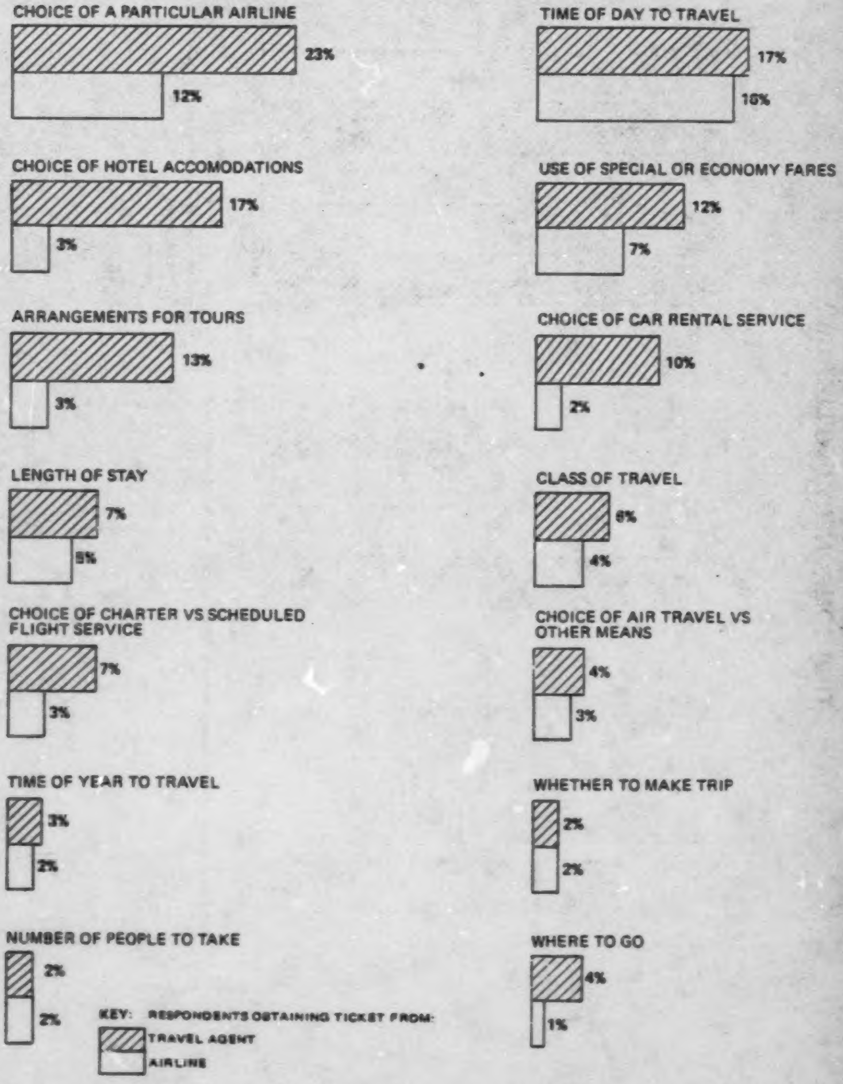
*Percentages include respondents who said they were influenced greatly and influenced some what.

EXHIBIT A-18

EXHIBIT A–19

TRAVEL AGENT/AIRLINE COMPARISON

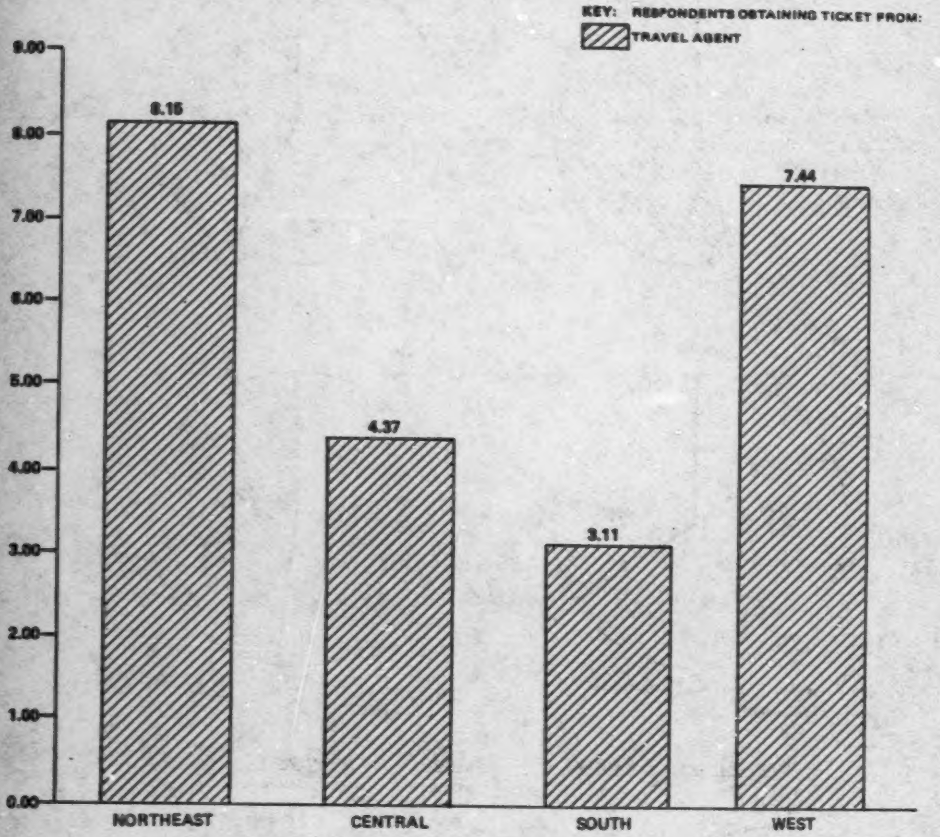
PREDECIDED AND UNDECIDED TRIP COMPONENTS CHANGED OR INFLUENCED*



*Based on respondents who said trip component was applicable to their trip. Percentages include respondents who said they changed their plans and those who said they were greatly or somewhat influenced.

EXHIBIT A-20

NUMBER OF TRAVEL AGENTS PER 100,000 POPULATION ACCORDING TO REGION*

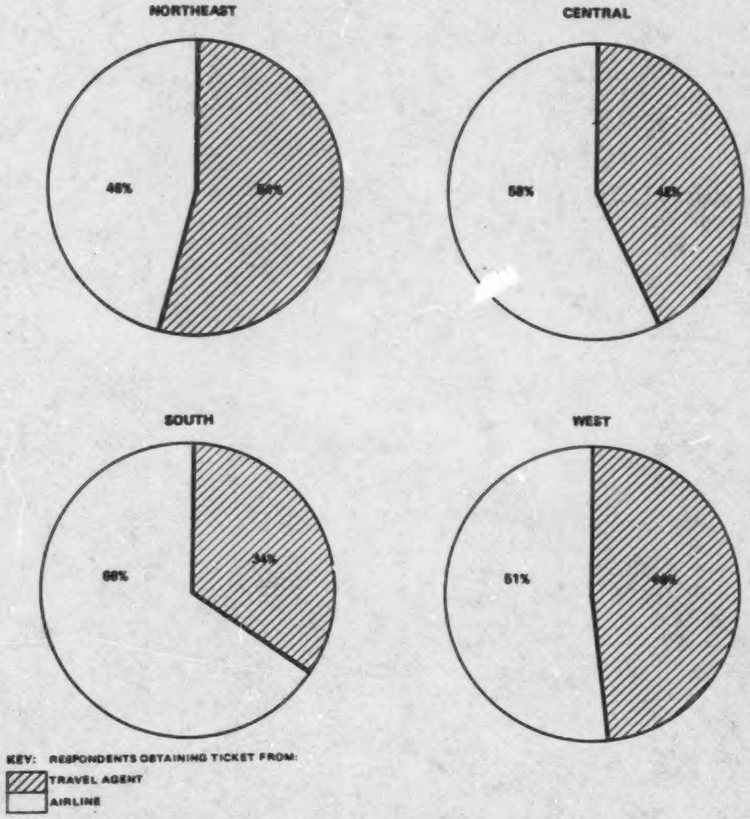


*Based on the economic study universe of 11,522 travel agents as of July, 1976 and U. S. census data for 1976.

EXHIBIT A–21

TRAVEL AGENT/AIRLINE COMPARISON

COMPARISON BY RESIDENCE
SOURCE OF AIRLINE TICKET



NORTHEAST

Maine
New Hampshire
Vermont
Massachusetts
Rhode Island
Connecticut
New York
New Jersey
Pennsylvania

CENTRAL

Ohio
Indiana
Illinois
Michigan
Wisconsin
Minnesota
Iowa
Missouri
North Dakota
South Dakota
Nebraska
Kansas

SOUTH

Delaware
Maryland
Washington, D.C.
Virginia
West Virginia
North Carolina
South Carolina
Georgia
Florida
Kentucky
Tennessee
Alabama
Mississippi
Arkansas
Louisiana
Oklahoma
Texas

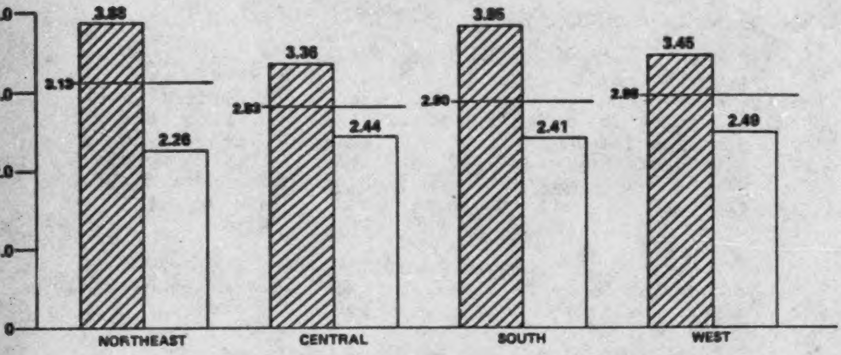
WEST

Montana
Idaho
Wyoming
Colorado
New Mexico
Arizona
Utah
Nevada
Washington
Oregon
California

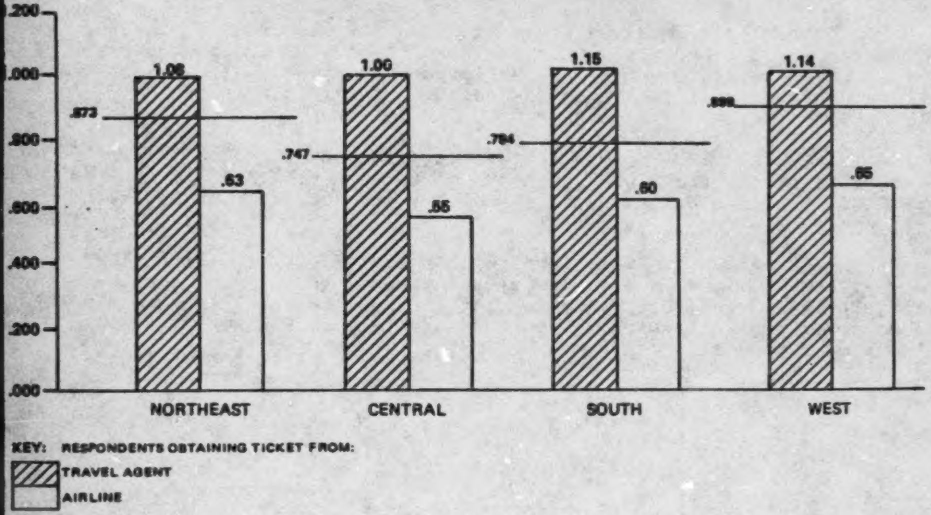
EXHIBIT A-22

TRAVEL AGENT/AIRLINE COMPARISON

COMPARISON BY RESIDENCE
AVERAGE NUMBER OF SERVICES PROVIDED



AVERAGE NUMBER OF TRIP COMPONENTS WHICH WERE CHANGED OR INFLUENCED



- Travel agents and airlines are able to influence travel plans to a greater extent in the Northeast and Western states.

- Regardless of the region, travel agents provide more services, and tend to have greater influence than the airlines.

7. Overall Ratings of Services

Respondents were asked to state whether the services provided to them by travel agents or airlines were very satisfactory, somewhat satisfactory, somewhat unsatisfactory, or very unsatisfactory. The majority of travelers gave high ratings to both travel agents and airlines and very few (approximately 3% in both cases) said that they were very unsatisfied with the services provided. Exhibit A-23 summarizes the findings on ratings for the average traveler and for various other types of travelers, as follows:

- In total, 80% of all travelers said that the services provided to them by either the airlines or travel agents were very satisfactory. Eighty-two percent of travel agent users said services were very satisfactory, while 78% of airline users gave the same rating.

- The highest ratings were given to both travel agents and airlines by the traveler whose trip is for personal reasons, whereas business and international travelers gave lower ratings.

- The airlines received somewhat lower ratings from frequent travelers. Only 66% percent of this group who used an airline gave very satisfactory ratings. Conversely, travel agents were able to maintain their high ratings with this group.

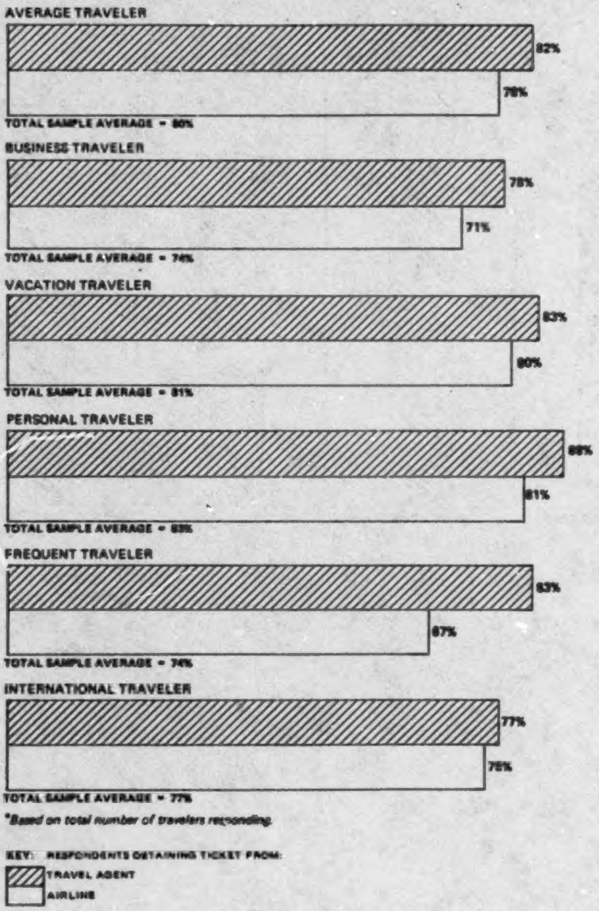
Exhibit A-24 shows the ratings given according to the residence of the traveler. As shown on the exhibit, slightly better ratings are given by travelers residing in the Central and Southern regions.

Overall, consumers appear to be satisfied with the quality of service provided to them. The ratings show that travel agents and airlines are effective in meeting the service requirements of the market segments which they serve and are providing value to their user groups.

EXHIBIT A-23

TRAVEL AGENT/AIRLINE COMPARISON

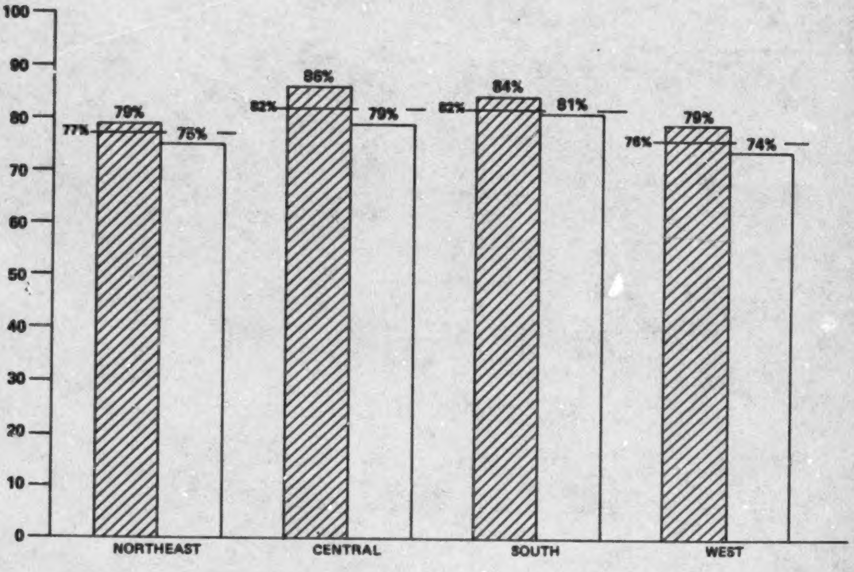
OVERALL RATINGS GIVEN TO SERVICES PROVIDED PERCENT OF TRAVELERS GIVING VERY SATISFACTORY RATINGS* ACCORDING TO TRAVELER TYPE



*Based on total number of travelers responding.

EXHIBIT A–24

OVERALL RATINGS OF SERVICE* ACCORDING TO RESIDENCE



*Based on number of travelers responding.

KEY: RESPONDENTS OBTAINING TICKET FROM:

▨ TRAVEL AGENT

☐ AIRLINE

Mr. McCLOSKEY. Mr. Knodt?

TESTIMONY OF RICHARD KNODT, PRESIDENT, AMERICAN SOCIETY OF TRAVEL AGENTS; ACCOMPANIED BY PAUL RUDEN, SPECIAL COUNSEL

Mr. KNODT. I would like to reemphasize the point on BTD's. They already have every opportunity to gain volume discounts or any other type of discount that they can gain. They simply haven't had that success, and that is an economic problem in the free marketplace at work.

Why won't the Board's approach work? The Board's opinion in the marketing case states that deregulation requires a measure of faith. That is fine.

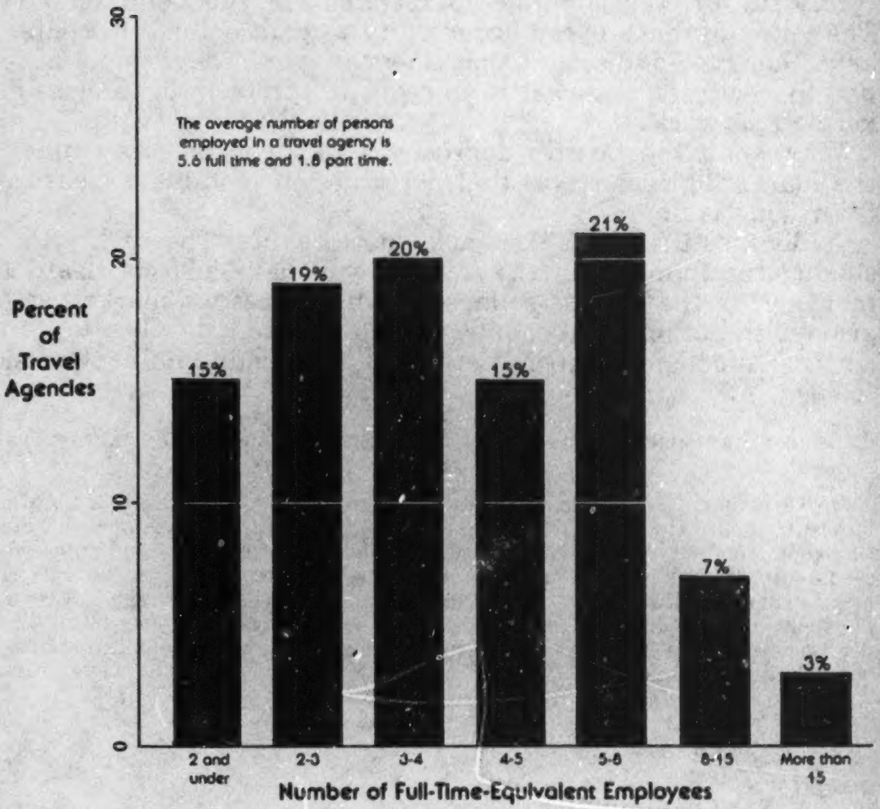
As long as that faith does not ignore reality. The reality that is staring the industry in the face, as you have already heard this morning, is the risk of collapse of the industry's marketing program with nothing real or imagined to replace it.

[Mr. Knodt's prepared statement and additional submissions follow:]

PREPARED STATEMENT OF RICHARD KNODT, PRESIDENT, AMERICAN SOCIETY OF TRAVEL AGENTS

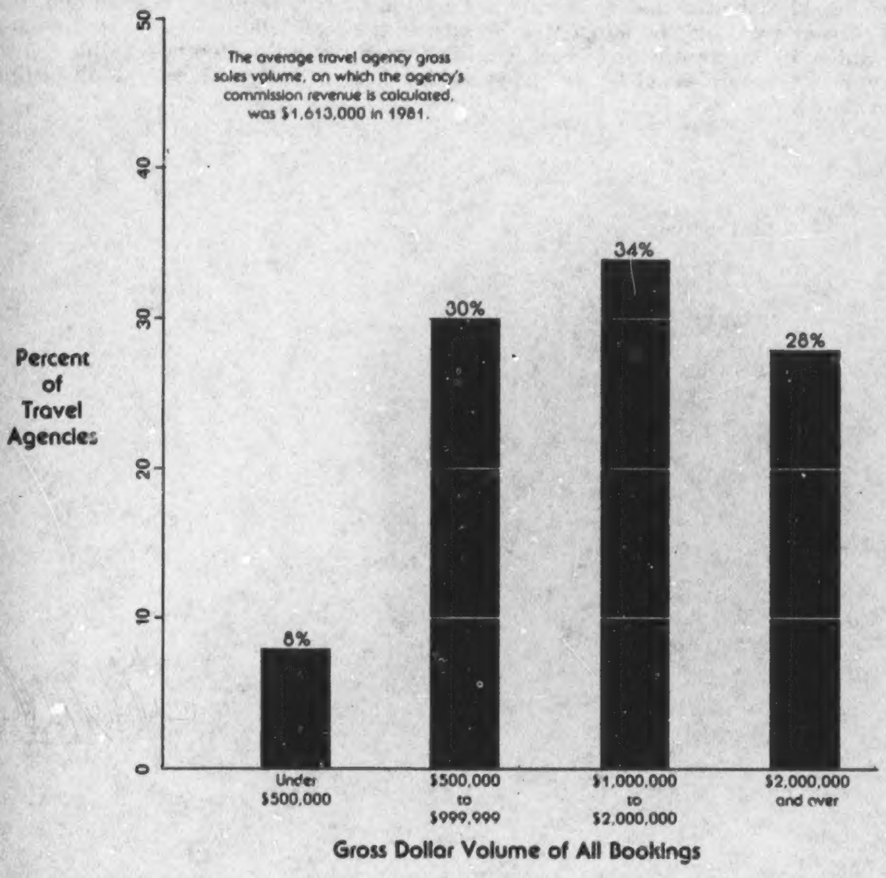
Mr. Chairman, the American Society of Travel Agents, Inc. (ASTA) is the world's largest trade association of professional travel agents, with more than 10,000 domestic agent members and a total worldwide membership of agents and suppliers exceeding 18,000. Like most travel agents, the overwhelming majority of our agent members are small businesses, very small businesses in fact. Average full time employment in our industry is about six persons per agency. Gross sales of all services per agency average less than $2 million. The charts following graphically shows the basic characteristics of our industry.

Number of Travel Agency Employees



Sources: The U.S. Travel Agency Market 1981, Louis Harris & Associates
Joint Travel Agent/Airline Economic and Value Study, Touche Ross & Co., 1978

Travel Agency Sales Volume



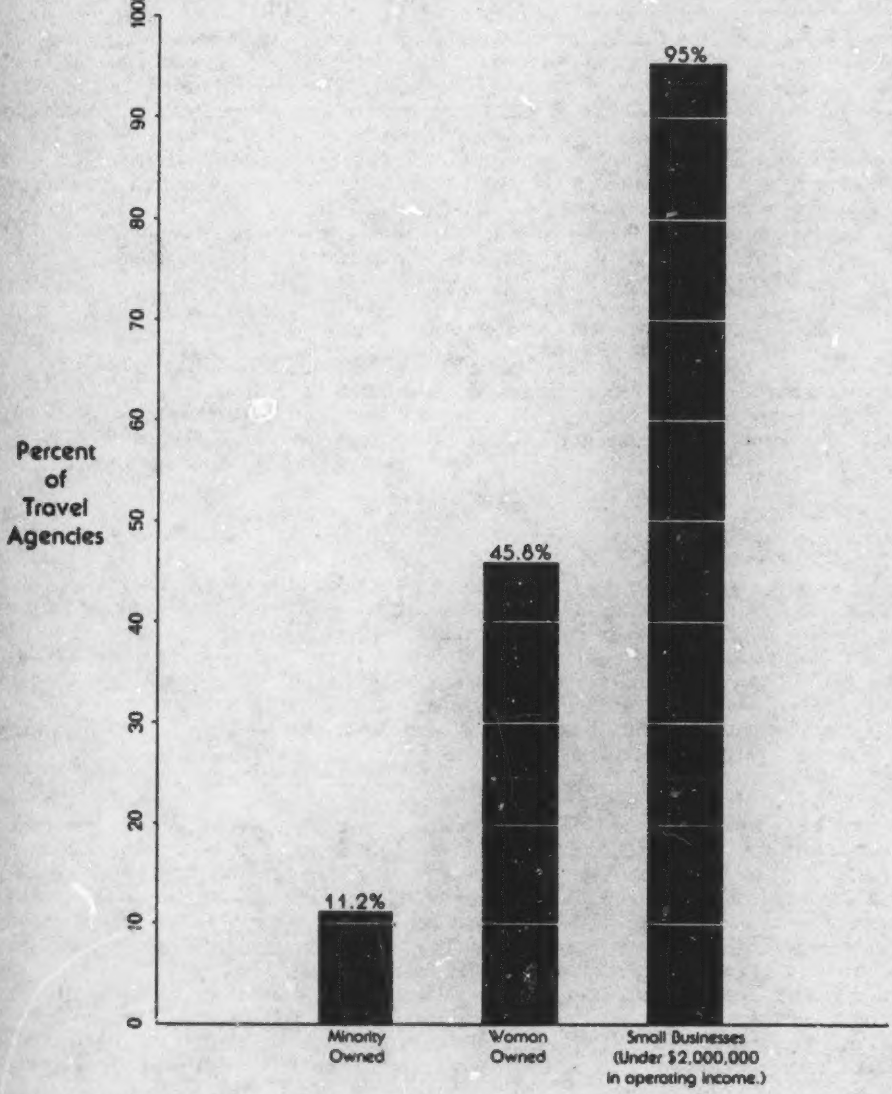
The average travel agency gross sales volume, on which the agency's commission revenue is calculated, was $1,613,000 in 1981.

Source: The U.S. Travel Agency Market 1981, Louis Harris & Associates

The Small Business Administration classifies travel agencies as "small business" if they have gross commission revenue under $2 million. On that basis almost all agents are small businesses.

Although agents share the trait of small size, we are proud to note the diversity of opportunity that has existed in our industry under the professional accreditation standards that we discuss in this testimony. A very thorough survey conducted in October 1982 showed that 46 percent of travel agents are owned by women and that 11 percent are owned by minorities. Because of the accreditation system that results in automatic appointment of each qualified agent by all conference airlines, each new agent, regardless of his assets, starts business with equal access to all airline "inventory."

Travel Agency Ownership



Source: ATC Survey, October 1982

Because of recent developments affecting the competitive structure of our industry, it is most timely that this subcommittee is conducting this hearing. We appreciate the chance to address you about issues that we believe to be of paramount importance to the small business character and competitive vitality of the travel agency profession. Public confidence in the integrated air transportation network, the best in the world and one that we believe the Congress intended to keep when it passed the Airline Deregulation Act, is in jeopardy.

We refer to the recent decision of the Civil Aeronautics Board in the Investigation into the Competitive Marketing of Air Transportation. That proceeding was an investigation of intercarrier agreements designed to give the industry an efficient, shared distribution system of retail agents that is of enormous benefit to the industry and the travelling public. These agreements provide a centralized process for common accreditation and appointment of travel agents that is extraordinarily efficient. Because all travel agents must meet a specific set of minimal professional experience and financial integrity qualifications which are acceptable to the airlines, the airline parties to the agreements are enabled to accept each other's agents with a minimum of expense. The airlines are thus able to recognize and honor the tickets issued by such agents, facilitating the provision of interline transportation throughout the country and the world.

SUMMARY OF TRAVEL AGENCY ACCREDITATION STANDARDS

Financial—ATC: Bond ranging from $10,000 to $50,000 depending on sales volume and working capital. IATA: Minimum working capital of $15,000.

Personnel—Owner or manager have at least two years experience as travel counselor or manager in passenger transportation business, must demonstrate knowledge of Travel Agents Handbook, and must be employed full-time on agency premises.

One full-time employee (can be the manager, above) must have at least one year experience in the last three years in airline ticketing with a conference carrier or accredited travel agency.

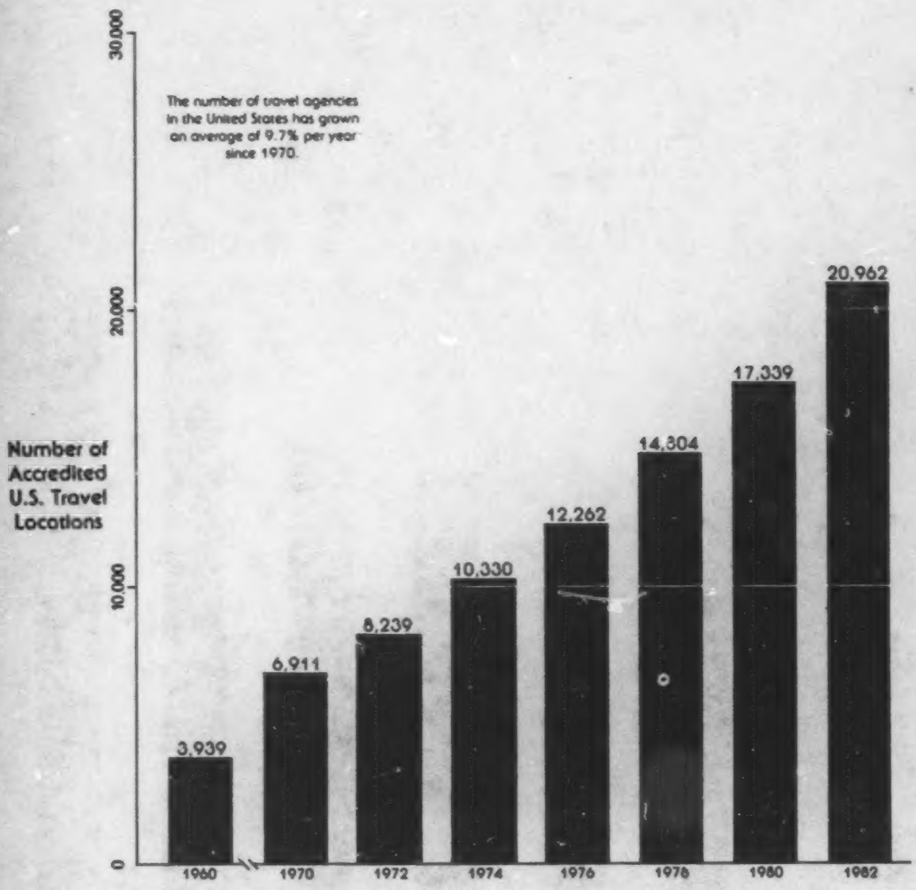
Location—A location must be set aside for the sale only of travel services, freely accessible to the general public, and open at least 35 hours per week. (IATA requires only that the office be open on a regular schedule).

Service to the public—Agency must do at least 80 percent of its business with the public (i.e., cannot do more than 20 percent with itself). No commissions paid for ticket sales to agency owners or employees.

Ticket security—Agents must comply with strict rules for protection of unused ticket stock. Supply of blank stock is limited.

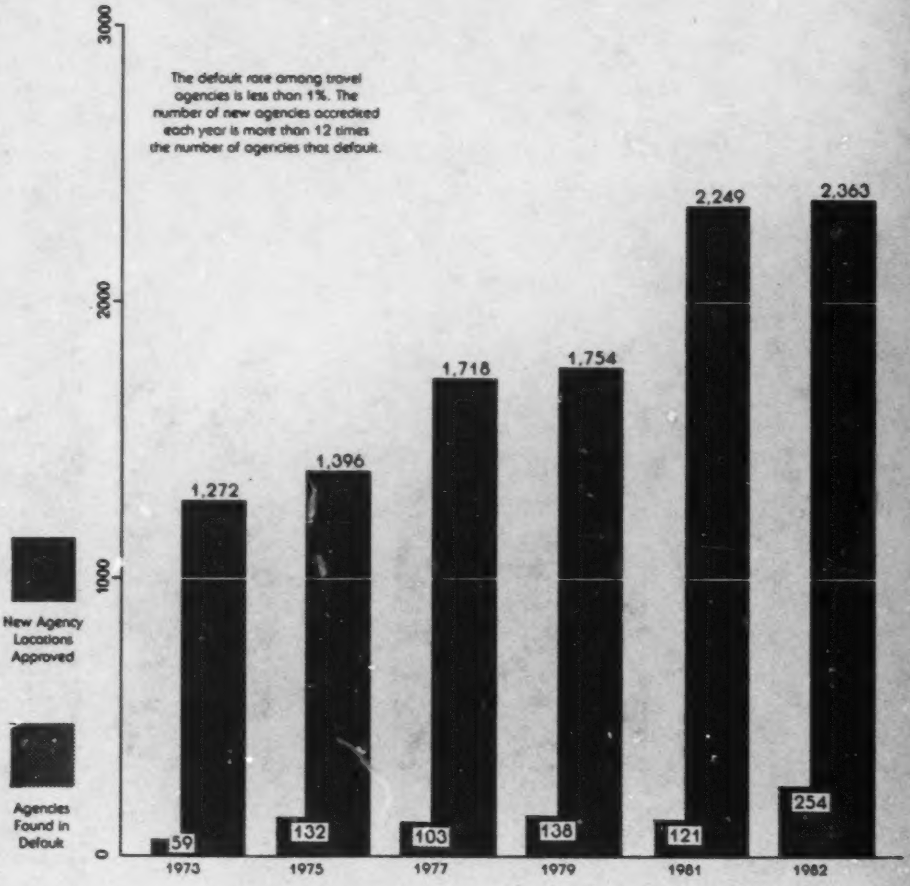
The integrated nationwide network of travel agents that is produced by the agreements has evolved, with the oversight and approval of the Civil Aeronautics Board, over a period of forty years. This system has served the airlines and the public exceptionally well. It lowers costs and helps sustain demand. It is extremely competitive and at the same time remarkably stable. The number of travel agent locations has grown steadily and rapidly to the point where there are now more than 21,000 agency locations throughout the United States. The agency industry has experienced substantial entry by new competitors and great diversity in the marketing approaches taken by individual agents. Agency failures occur at an extremely low rate. Even when an agent does fail, the tickets it has issued are honored by the conference airlines. Conversely, because the airlines can rely on a common system of agents, they have been able to guarantee substitute transportation for the public on agent-issued tickets when an airline ceases operations. The system thus provides the public with greater security in dealing with the airlines through their agents and provides the airlines with a stable distribution network that now accounts for more than half of all airline sales. The extraordinary stability and rapid growth of our industry is depicted on the following pages.

Growth in U.S. Travel Agencies



Source: Air Traffic Conference Data

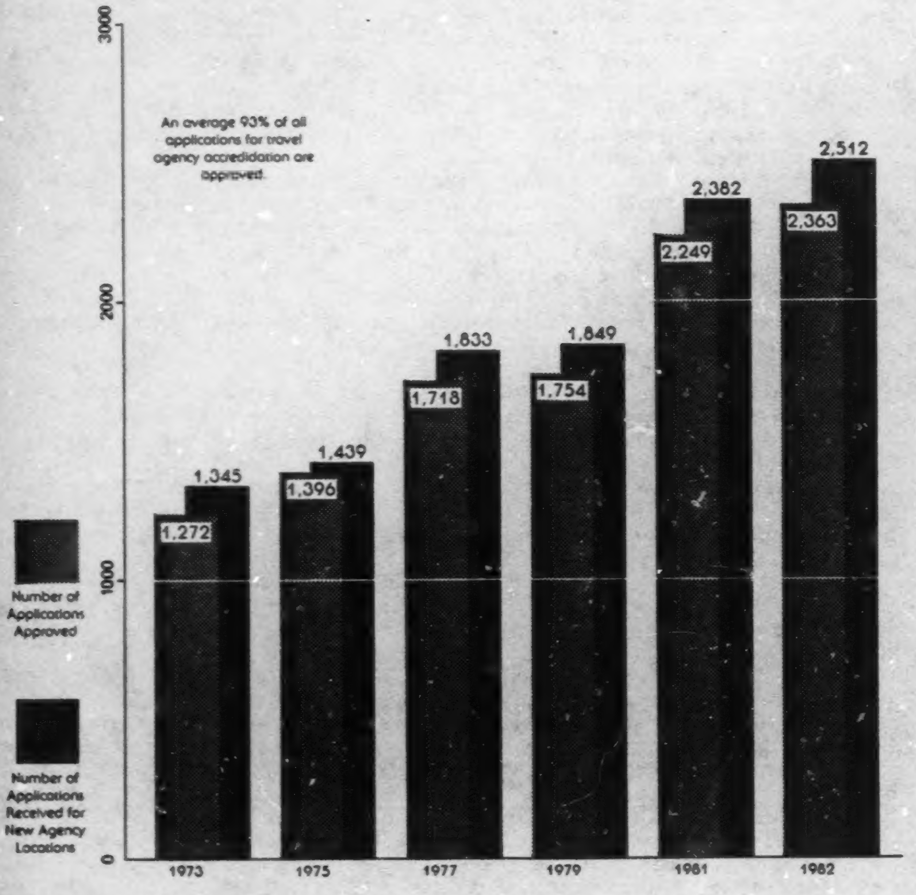
New Travel Agencies
vs.
Travel Agency Defaults



The default rate among travel agencies is less than 1%. The number of new agencies accredited each year is more than 12 times the number of agencies that default.

Source: Air Traffic Conference Data

Applications For New Travel Agency Locations



An average 93% of all applications for travel agency accreditation are approved.

Source: Air Traffic Conference Data

The agency system created by the agreements has promoted competition in many important ways and in particular has contributed to the ability of the airline industry to make the transition to a less regulated environment as contemplated by the Airline Deregulation Act of 1978.

In an increasingly confusing, and often chaotic, market, the fully representative industry travel agent, representing 150 airlines throughout the world, is a source of complete and objective information for consumers without parallel in other industries. The industry agent has likewise made it possible for existing airlines to enter new markets with maximum efficiency by providing such carriers with a pre-existing network of agents that already represent the new carrier. In addition, the network helps new airlines get started—they have immediate access to a national distribution system on equal terms with established carriers, thus avoiding an enormous financial burden in start-up costs. The conference system thus promotes airline competition and minimizes public inconvenience from the free entry and exit that was the intent of airline deregulation.

An Administrative Law Judge, who presided over the trial of the Investigation for the Board, recommended that the key features of the agreements be retained. This experienced Judge heard the testimony through 90 hearing days and personally studied all of the evidence and briefs objectively.[1]

The Judge held that the provisions requiring all agents to be accredited under the agreed-to standards were essential to maintain an efficient and integrated air transport network, especially one which would continue to provide interline transportation, a unique public benefit. The Judge also found that the accreditation system should apply only to persons acting as agents on behalf of the airlines, thus permitting entry into the retail ticketing business by firms interested in a non-agent or traditional retailer relationship with the airlines. He approved the Area Settlement Plan through which tens of millions of accounts are settled between agents and airlines. Finally, the Judge concluded that the agreements must continue to receive antitrust immunity, as they have for the past four decades, in order to continue operating effectively. This so-called "immunity" protects the airlines from civil and criminal attack against conduct that the government has administratively approved as in the public interest.

The airline parties to the agreements, the travel agency industry, and the only firm that appeared to seek entry as a ticketing retailer accepted the Judge's approach as reasonable and balanced. It sustained the vital elements of the agency network while allowing new opportunities for innovation.

The Civil Aeronautics Board itself, however, by a divided vote, overturned the recommendations of the Administrative Law Judge and struck down the key provisions designed to hold the system together. The Board concluded that the provisions requiring all agents to be accredited should terminate immediately as to agents that sell the service of a single carrier on a given itinerary. The uniform accreditation requirement was also ended immediately in cases where two or more airlines agreed to allow interline sales by unaccredited agents across their lines.

The Board also disapproved, as of January 1, 1985, the standards designed to limit accreditation to persons interested primarily in engaging in a public business as an agent for promotion and sale of the airlines' services, as distinct from airline customers interested primarily in dealing for their own account and using agency accreditation as a device to obtain discounts from prices that airlines would otherwise charge. Without reference to the public confusion that could result if non-conference agents obtain access to standard agents' ticket stock, the Board ordered that the Area Settlement Plan must be opened to any ticket seller desiring to participate. Finally, the Board stripped all of the carrier marketing agreements of all antitrust immunity as of January 1, 1985, and indicated that many parts of the agreements would have to be changed in order to avoid antitrust attacks in the future. Thus, while both the Board and the Judge sought new avenues for entry and innovation, the Board eliminated the vital elements of the programs that the Judge had sustained to assure the survival of the public benefits of the accreditation programs.

The entire basis for the Board's objection to the Judge's recommendations is economic theory. The Board saw the central issue as one of deregulation versus regulation. It had earlier concluded that the conferral of antitrust immunity was inconsistent with deregulation, even though the Airline Deregulation Act continues indefinitely the authority of the Board to grant such immunity. The Board's desire to strip the immunity from the agreements led it to eliminate provisions that it believed, for the same theoretical reasons, were not sustainable without it, regardless of the public transportation benefits that those provisions secured.

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[1] The Summary of Conclusions from the Judge's Initial Decision is attached to this testimony as Exhibit A.

The Board also interpreted the agreements-review section of the Federal Aviation Act (Section 412) in a way that placed an impossible burden on proponents of the agreements. This is clearly revealed in the following passage from the Board's opinion:

"The dominance of travel agents in ticketing airline services is not in itself objectionable. If this market position were achieved or persists solely because of the efficiencies of the existing distribution system vis-a-vis other options for purchasing tickets, there would be little basis for challenge under antitrust standards. However, with the exclusivity provisions in place we cannot find that this is the result of the normal operation of market forces but must instead presume that present industry-wide agreements are dictating marketing structure."

Under this rationale, as long as the mandatory accreditation rules were a reality, as they have been for decades, any binding agreement that had an impact on the market would have been condemned. Although the Board could point to no market demand that had gone unmet and to no evidence of competitive failure or monopolistic pricing, it did not find the kind of market it thought should exist and therefore rejected the agreements before it.

This is neither the approach nor the result that the Congress intended when the agreement-review and antitrust immunity sections of the Act were amended in 1978 and 1979. The Board's recognized enthusiasm for completing the deregulation process must be measured and overseen by the Congress when matters affecting the basic structure of the industry are involved. This is especially important where the Board itself is facing near-term extinction and will thus not be available to deal with long-term consequences of its decision. Conversely, the deadlines established by the Board's decision effectively foreclose any successor agency from reviewing the Board's action in a timely manner.

The Board says that there is nothing to worry about—the marketplace will take care of everything; nothing serious has happened since the Board's decision, the most efficient business will prevail, consumers will get what they demand and so on.

These economic cliches, as seductive as they sound on the surface, miss the point entirely. Travel agents, for example, face more competition from new entrants to our business than any service industry in the country. We are not strangers to competition; we're pretty good at it, in fact, and we have not based our objections to the CAB's decision on the claim that the business of professional travel agents should somehow be protected.

It was in fact market forces that led the airlines to create the agency accreditation programs in the first place and to build their marketing systems around them. If there has been any restraint on the development of marketing alternatives, it has been the CAB's own regulation of non-agency ticket distribution, and not the accreditation programs, that has been the cause.

The market forces that led the carriers to rely upon accredited agents as their primary distribution channel still exist. They are evident in the demand of the airlines for mutually agreed-upon professional standards that enable them to share the entire agency network and that promote public confidence in that system. They are also present in the increased reliance placed upon the professional travel agent by the traveling public during the confusion over fares and services that has marked the road to airline deregulation. The accredited agency distribution system thus meets the needs of the airlines that pay for it and the consumers who rely upon it.

This, of course, is the point on which the CAB bases its claim that the rule requiring all agents to be accredited is unnecessary to retain the other obvious benefits of the conference programs. This is so, the CAB says, because the demand of the airlines and the public for those benefits will by itself cause the airlines to adhere to the conferences as long as doing so serves their interest.

Can it be that simple? Is the so-called agency exclusivity provision nothing more than a transparent scheme to protect accredited agents from competition while serving no meaningful role in generating the public benefits of the accreditation program?

Who or what are agents protected from? The number of agency locations doubled over the past eight years. In 1982, while the programs were still in full effect, five new agency locations were opened every day on the average. It is very difficult, to say the least, to imagine a situation producing more competitive pressure on agents. And we emphasize that the Judge's decision that we support would allow new forms of ticket distribution to enter the market, including the single largest retailer of tickets of any kind in the United States.

Perhaps, then, the problem is the alleged predictability of the form that agency competition takes, as the CAB suggests. Again, an open-minded look at the actual marketplace shows extraordinary diversity in the marketing of agency services. We have agencies that tend to specialize in different types of markets: vacation travel, commercial travel, packaged services; or who emphasize different geographic destination markets as areas of special expertise; or who tend to serve specific segments of the market, such as individually planned touring itineraries, ethnic groups, commercial customer in-plant services, and so on. Today's agents offer a vast and varying array of individual services such as ticket delivery, travel cost effectiveness reporting, dedicated staff, WATS lines, 24-hour service, guarantees of lowest fares, onsite service, to name a few. And agents who have emphasized one type of market or service in the past are branching out into new areas, always challenging the other agents with whom they compete. No, predictability cannot be the real problem because it simply doesn't exist.

The Board appears to be saying that the real problem is that the airlines have given up their freedom of choice. The Board believes that the competitiveness of the air transport system depends upon each airline being free to appoint its own exclusive agents or to agree with one or a few other airlines to share semiexclusive agents.

As theoretical matter this seems not unreasonable. But on a closer look, what is the real benefit? It would certainly permit, as the Board has advocated, any airline to appoint anyone it likes to act as its agent when its own financial condition has begun to impair its market position. But this prospect raises several serious questions. Will such unaccredited agents have the same incentive as accredited conference agents to fully inform their clients of the risks affecting the public's money and expectations in such cases? If nonaccredited agents will make the same disclosures as industry agents accredited by the conferences, then the rationale for allowing them to operate (airline-self-defense) makes no sense. If non-conference agents are not going to inform the public of these risks, is the public welfare improved by allowing such persons to hold themselves out as travel agents? If such "agents" gain access to standard agents' ticket stock, how will the public distinguish between the interlinable traffic documents issued by industry agents and the restricted tickets issued by the new group? As a society we do not ordinarily allow companies in financial difficulty to operate free of the normal restraints on deception and unfair practices, just as we do not allow them to unilaterally disregard their obligations to protect the safety of the public. Thus, even if it were true that everyone in the industry has an incentive to act responsibly, fairly and rationally, a naive concept disproved by all of our industrial history, the accreditation programs as approved by the Judge assure the industry and the public that, as to agents, there will be no departure from professional standards in the accreditation process.

Travel agents and airlines alike are opposed to opening the door to unprofessional conduct in our industry. We have no incentive or desire to drive any airline from business—quite the contrary, agents are better off, our jobs are easier and our profit opportunities better, when the airlines we serve are profitable, stable and vigorous. At the height of the financial battering that the airlines experienced during the 1981-1982 recession, ASTA vigorously supported the creation by the airlines of the Default Protection Plan. Under the DPP the purchaser of a ticket issued by an accredited agent is assured by conference airlines that substitute transportation will be provided if the ticketed carrier ceases operations. The DPP protects the public and the industry *and*, significantly, was the recipient of antitrust immunity from the CAB. Agents also supported changes in ATC procedures that would assure that an agent's choice of airline identification plate for ticketing purposes was as competitively neutral as possible, thus avoiding manipulation of airline cash flows for the benefit of a handful of airlines at the expense of the rest.

We have built a system that give all airlines, new and established, equal access to a national distribution system that assures each carrier of its fair opportunity to gain passengers based on the competitive value of its services and fares. The airlines and the public have a high level of confidence in that system and nothing should be allowed to undermine that confidence by benefiting a few at the expense of many. Yet economic reality suggests that the CAB's goal of having non-conference agents in the market will be achieved only by eliminating the professional standards that have protected the public under the accreditation programs.

Mr. Chairman, we are well aware that the CAB has labelled our view "apocalyptic." This is not so. Nothing we have described is going to "destroy travel agents." We're here to stay and most of us can adapt to the market that, as the CAB often notes, we know best. That is not the problem. What is likely to happen is more mundane than that, but no less serious.

Focusing on this subcommittee's principal interest, the CAB's decision to strip the airline accreditation agreements of their antitrust immunity will, in our view, have severe consequences for the industry and the public. The Board has recently noted that business travel departments, in-house divisions of large corporations that write tickets and make reservations for their parent firm (basically in-house purchasing departments), have been trying to force their way into the status of accredited agents under the programs. They seek this not because they want to be agents of the airlines in any meaningful sense but because they are customers who seek discounts that airlines have thus far been unwilling to grant voluntarily.

Without antitrust immunity, the ability of the airline conferences to limit the agency program to real agents, i.e., persons who stand in the shoes of the carrier and deal on its behalf with the public, is in grave doubt. If the BTD's, as they are called, are successful in forcing their admission to the programs under threat of antitrust lawsuits, which they have repeatedly made, the airlines, in order to retain the programs, would have to deal within the conferences with their agents and with their customers, the BTD's, at the same time and the airlines will have to do so subject to the constant threat of antitrust attack. We see no practical way that the conference process can be continued under these circumstances.

Alternatively, the conferences could refuse to allow any input by affected parties, thus cutting off the right of agent participation that the CAB required of the conferences years ago to assure fair play for agents affected by the collective action of the airlines. Of course, the agents would have the right to challenge conference actions under the antitrust laws too.

The problems with this approach are painfully clear to those of us who have participated in the development of these programs. The entire accreditation system, and the many benefits that flow from it, depend upon an atmosphere of cooperation. We despair at the notion that the conferences can continue to function under a reign of antitrust terror. Moreover, the travel agency community would not willingly accept a regime in which its right to participate in conference processes is curtailed and the remedy for grievances is an antitrust suit.

The conference participants, including travel agent representatives exercising rights to make input to conference decision-making, would also be exposed to antitrust attack from other sources. Although the Board appears to be saying that the airlines are free to recreate the equivalent of conference agency exclusivity through bilateral rather than multilateral agreements, the reality is likely to be quite different. If the airlines were able otherwise to maintain their resolve to continue using only accredited agents for interline purposes and if exclusive distributor-agents are not employed, any person who can not or will not comply with conference standards would be able to sue the conferences, and perhaps anyone who participated in conference discussions, alleging an agreement in violation of the Sherman Act. A single successful attack of this kind could then lead to a wave of similar claims. Every meeting would be fraught with antitrust exposure, making continual cooperation on matters of common interest exceedingly costly or impossible.

The Board says that such antitrust claims will be frivolous and are therefore of no concern. But again the reality is that no court will be bound to follow the Board's view of what is frivolous and what is not. The Department of Justice has already indicated its dissatisfaction with many provisions of the conference programs that the Board did not disapprove. And as time passes, the weight likely to be given to the Board's opinions will diminish in any case. Since most antitrust precedent has been developed in industries quite different from air transportation, the guidelines for acceptable conduct in many areas will remain unclear until years of costly litigation results in some clarity.

Can the industry survive this situation? Of course it can, but only at great cost. Those costs will inevitably be passed on to consumers. Will consumers get something valuable in return? The answer is clearly "no."

There are other problems as well. Another feature of both the domestic and international conference is Office of the Travel Agent Commissioner. This office was created to assure fairness to new agent applicants and to those against whom the conferences had brought an enforcement complaint alleging some infringement of the agent's obligations to the airlines. The Commissioner's procedures assure due process to all agents. The Board removed immunity from these programs as well. There is little likelihood that the Commissioner program can continue to function when an attempt is made to enforce collectively-reached standards and rules which lack immunity.

It is easy to say, as the CAB often has, that other industries get along with only the Sherman Act and therefore so can the airlines. The problem is the gap between theory and reality that underlies such generalizations. Many of the "other" industries the CAB presumably has in mind are subject to a vast array of federal and state laws governing their operations, including the Uniform Commercial Code, state and local licensing laws, federal and state safety regulation and many others. The airline industry, on the other hand, is not suitable for that kind of fragmented, product-oriented regime. The distinctive feature of the airline industry is that it not only involves a service in interstate commerce but is heavily dependent on cooperation among competitors to produce joint services that are of unique and enormous benefit to the public. We know of no other industry that depends as heavily as ours upon cooperation to produce such a large share of the total service offered—interline service involving two or more airlines accounts for a third of travel agents' air sales. Other cooperative services are well known to airline travelers, such as the ability of most any airline to accept or refund tickets written on any other airline. It is in this uniquely cooperative atmosphere that the conference agency programs were born, have developed and should continue.

Will the public really benefit from a regime in which a necessarily cooperative system like the agency accreditation programs must be maintained through litigation or the threat of litigation? Will public welfare improve if the successful and publicly accepted industry system of self-control is supplanted by myriad state and local efforts to protect consumers? Both common sense and business sense suggest that the prospects for the programs under this approach are extremely poor.

When the accreditation programs fail, the consequences are clear. Industry costs for distribution will rise, as the expense of reviewing, approving, supervising and enforcing an agency network shifts from the conferences to the airlines. Each airline's effective access to the national distribution system will diminish as the cost of access increases. Carriers entering markets they have never served will find that establishing a marketing presence is must more costly. On the other side of the board, entry by new agents will diminish as the cost of application and compliance with individual carrier rules increases. As some carriers see a short term advantage in trying to establish more-or-less exclusive agency distributors, the diversion of marketing resources by competitors to responsive practices will escalate and commitment to the fully shared agency system will decline. The willingness of the airlines to continue participating in publicly beneficial programs such as the Default Protection Plan would likewise diminish. The overall effect on competition in the industry will be negative, as the Judge concluded:

"The difficulty in applying the rule of reason test to determine the legality of the agreements under the antitrust laws, the inability of the Board to give res judicata effect to any determination by it in that regard, and the express position of the Justice Department that the agreements in their entirety are anticompetitive underscore the need for antitrust immunity in order to secure the important public benefits dependent upon the agreements and the marketing system they enable and represent.[2]

None of these projections is "apocalyptic"—they are the natural and foreseeable consequences of the Board's decision, at least if the Board's rationale has any substance. The Board itself explicitly recognized that use of agents outside the conference programs would be more costly and less convenient. But that does not mean that it will not happen; nor does it mean that it would be "competitive madness" for any carrier to undertake nonaccredited agency relationships and start the deterioration process. There is ample precedent in the short-term pricing strategies that have pervaded the airline industry through most of the deregulation process. The entire premise of the Board's decision is that some airline may want to do this and should not be deterred.

Who then will pay the increased costs that result from deterioration or elimination of the accreditation programs? The travelling public will have to pay, of course.

Are these reasonable foreseeably benefits to the public that would not exist under the Judge's approach and that warrant risking the collapse of the conference approach? The Board has not identified those benefits except to say that "competition is best." Although the Board claims that there might be some portion of the market that could be served "more efficiently" by a non-conference agent, it does not identify that "portion," or indicate what aspects of the conference system, as approved by the Judge, would prevent the efficient servicing of that demand. The Board never explained why its enthusiasm for exclusive distributorships could not be accommodated under the Judge's approach, which could avoid confronting the public with "travel agents" who are really only distributors for one or for a few select carriers.

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[2] Opponents' assertion that other industries may not seek relief from antitrust law lacks point, since Congress has determined to continue the possibility of antitrust immunity in the airline industry where required by the public interest. [Initial Decision at 210]

ASTA's solution to these problems is straight forward, the prompt passage of H.R. 2053, the Air Travellers Security Act of 1983. This bill is designed to accomplish only one thing, but it is in our considered judgment vital to the future well-being of the air travelling public and to the industries which serve that public. The bill directs the Civil Aeronautics Board to vacate its decision in the Investigation into the Competitive Marketing of Air Transportation and to replace that decision with the Recommended Order of the Administrative Law Judge who tried the case through 90 days of hearings. H.R. 2053 has the support of the professional travel agency community, comprising almost 16,000 agencies with 21,000 locations in every corner of the nation. Its passage is also endorsed by the domestic and international airline industries, more than 150 carriers linking the United States internally and with the rest of the world. The concern about the CAB's decision is so widespread that leaders throughout the hotel and cruise industries have likewise called for enactment of H.R. 2053.

H.R. 2053 is a short and simple bill on its face. But the issues raised by the Competitive Marketing case are enormously complex and far-reaching. During the three-and-one half years that the case was pending before the CAB, a record of more than 40,000 pages of exhibits, testimony and decisions was produced. The case involved two Administrative Law Judges and spanned the terms of two Chairmen at the CAB. The cost to the industry must be tolled in the millions of dollars.

The Competitive Marketing decision is a case of economic theory run amuck, a case of dedication to principle being carried beyond the limits of commercial common sense and business reality. More importantly, the CMI is a case in which the Congress' intent in the Airline Deregulation Act of 1978 has been misapplied to the inevitable detriment of the travelling public and the airline and travel agency industries. Surely in the face of the Board's near-term demise, the Congress must examine in the closest detail one of the most important decisions that the CAB has ever made.

Will enactment of H.R. 2053 prevent business travel departments from being accredited as industry agents? Yes. One of its objections is to allow the conferences to retain the rules that limit accreditation to firms whose purpose is to act as selling agents to the public. Will these departments be adversely affected? No. It is critical to understanding the agency programs to recognize that they are designed to deal only with conduct within the scope of the conference. BTD's thus will continue to be able to bargain for discounts individually with any carrier willing to do so. In addition, while the CAB argues that claiming compensation for self-dealing is an accepted practice in other industries and should be accepted in air transportation marketing as well, when there are no tariffs and no prohibitions on rebating, nothing in the conference rules prevents any willing airline from financially recognizing tickets sold by agents to themselves or their affiliates. The programs merely prevent self-dealing agents from claiming commissions in due course thereby placing costly burdens on the airlines to individually identify and deal with compensation policies on such tickets. Thus, the conference rule against commissions for self-dealing is designed to reinforce the purpose of the programs to accredit agents for sales to the public, but any carrier wishing to reward an agent for sales to himself or to affiliates can easily do so in private arrangements outside the conference programs and outside the Area Settlement Plan.

The representatives of BTD's will likely argue that the opportunity for bilateral bargaining for compensation that accounts for their self-ticketing is insufficient because no carrier is willing to pay such compensation in any form. If true, this assertion is irrelevant. Even the CAB acknowledged that it would be wrong for the government to try to force the airlines to pay BTD's. The question of opportunity must not be confused with the question of successful exploitation of opportunity.

Will enactment of H.R. 2053 protect travel agents or airlines from competition? No. New agents, with diverse goals and in any size, will be able to enter the industry under the conference programs. Non-agent ticketors can likewise enter under bilaterally negotiated contracts with each airline. Airlines will be free to price and market directly in any manner they chose. Conference agents would thus face a withering array of actual and potential competition under this legislation.

Will the continuation of antitrust immunity result in perpetually thwarting the enforcement of the antitrust laws in this industry? Clearly not. In the first place, any conduct outside the scope of approved agreements, and actions necessary to carry them out, is not covered by the immunity at all. For example, if members of the Air Traffic Conference were to fix prices at an ATC meeting held to amend the agency program, they would clearly be subject to antitrust enforcement. Second, the government agency with continuing jurisdiction over intercarrier agreements can reexamine the competitive operation and effects of the accreditation agreements at any time that circumstances warrant. Thus, the principles of competition embodied in the antitrust laws are not permanently suspended by H.R. 2053—the legislation would simply prevent repeated litigation in the courts about the agreements between administrative reviews of the programs.

Finally, will the public be benefitted by adoption of H.R. 2053? It clearly will. The Judge who tried the case was intimately and personally involved in testing the evidence presented by all sides during the lengthy hearings. His ultimate conclusions are the best statement of why the Congress should intervene:

"[The accreditation] agreements provide a uniquely integrated marketing system based upon the ubiquitious presence of industry travel agents which represent all carriers and enjoy the confidence of the public and carriers alike in their competence and reliability because of commonly administered accreditation standards. The system enabled by those agreements also undergirds and enables the current system of interlining, and interchangeability and refundability of tickets.

"All of these benefits depend upon the mutual trust of approximately one hundred forty carriers participating in the system and their trust in the competence and reliability of common agents. If the trust and confidence of the participating airlines in the current integrated marketing system are eroded, the costs to the airlines and travel agents would be substantial. The costs to the public and to the public interest would be enormous."

We urge this subcommittee to examine the issues we have raised and issue a report endorsing the early enactment of H.R. 2053.

EXCERPTS FROM INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE YODER

Summary of conclusions

The agreements at issue do not in general substantially reduce or eliminate competition. While they provide parameters within which competition occurs, and hence reduce or eliminate some competition, in general they enable and encourage healthy competition; and any reduction or elimination of competition is not "substantial" within the meaning of that term in section 412 of the Act. Moreover, to the extent that the agreements in question reduce or eliminate competition, we find that the agreements are neccessary to meet serious transportation needs and secure important public benefits and that there is no showing in the record that viable, less anticompetitive alternatives are available.

The substantial public benefits which have accrued from the agreements at issue during the past forty years can be preserved only if the agreements continue to be approved and continue to receive antitrust immunity. Those agreements provide a uniquely integrated marketing system based upon the ubiquitous presence of industry travel agents which represent all carriers and enjoy the confidence of the public and carriers alike in their competence and reliability because of commonly administered accreditation standards. The system enabled by those agreements also undergirds and enables the current system of interlining, and interchangeability and refundability of tickets.

All of these benefits depend upon the mutual trust of approximately one hundred forty carriers participating in the system and their trust in the competence and reliability of common agents. If the trust and confidence of the participating airlines in the current integrated marketing system are eroded, the costs to the airlines and travel agents would be substantial. The costs to the public and to the public interest would be enormous.

Deregulation has introduced in the marketplace a burgeoning number of changes in carriers serving particular markets, unprecedented numbers of new air carriers, and consequent complexity in fares and service offerings. At least partially as a result of this move toward deregulation, consumers have perforce become more dependent upon the travel agent system for accurate, current, and comprehensive information concerning the service offerings of competing airlines. If the competence, ubiquity or universal representation of travel agents is diminished, consumers will be hindered in obtaining competitive information where and when they need it and will be unable to assess adequately the completeness of the information profferred or the scope of each agent's representation. Interlining, and interchangeability and refundability of tickets, would also be impaired if unaccredited agents representing less than all carriers and having the confidence of less than all carriers proliferate in the marketplace. Erosion of the commonly appointed accredited travel agent system poses the risk of consumer confusion and injury out of proportion to any prospective benefits from the entry of unaccredited or individually appointed agents.

Thus we also conclude that agency exclusivity must be continued if the agreements themselves and the marketing system they represent are to be preserved. If agents can obtain appointment and carriers can appoint without accreditation, the need for accreditation would disappear, its use would dissipate, and the confidence of the public and carriers in the travel agent system would decline. Agency exclusivity is the heart of the conference accreditation system. Without it, conference accreditation and the present marketing system would deteriorate, with no assurance that an adequate, let alone equivalent, alternative could or would arise. Certainly the risk of such consequences is sufficiently great to require caution in mandating changes in the current system, which appears to work too well to justify radical fixing.

On the other hand, we conclude that the ATC agreement should be amended to eliminate provisions for "marketing exclusivity" which prohibit payment of sales commissions to any person other than an accredited agent. This provision is not duplicated in the IATA resolutions, which permit the utilization of non-agents in marketing roles but, like ATC, prohibit the use of unaccredited persons as agents. Since IATA has successfully operated its program without "marketing exclusivity," elimination of that restriction would not seem to pose any threat to the accreditation system itself; and the record suggests that new marketing initiatives may be possible in dealing with non-agents if "marketing exclusivity" is removed. In particular, we anticipate the possible use of Ticketron as a ticket vendor in marketing point-to-point, single segment tickets outside of the Area Settlement Plan, and we require a specific exception to ensure that conference members can obtain such services from Ticketron—as a ticket dispenser and not as a travel agent. Other objectors to the agreements (HATA and ATBB) could be compensated as service suppliers under the current resolutions without impairing their operations or the travel agent system. While NPTA seeks travel agent status for corporate business travel departments (BTD's), by definition they are not and cannot be agents of the airlines and do not want to be travel agents; they can however, obtain compensation for their BTD functions under the Board's decision disposing of Phase 5 of this proceeding (ER-1246).

We conclude that with respect to certain provisions the agreements should be approved only upon condition that specified changes be made to remove unnecessary restraints on competition and better serve the public interest. But the fundamental question presented in this proceeding is whether the complex and interrelated system of marketing air transportation can best function in the public interest in an atmosphere of voluntary agreement between carriers enabling mutual trust, with consensual standards for the appointment and utilization of common agents in the marketing of air transportation. We conclude that the public interest can be served only if that system is preserved. For similar reasons we reach similar conclusions with respect to the Area Settlement Plan and the IATA cargo agreements.

ASTA

American Society of Travel Agents, Inc.

Richard C. Knodt
President
and Chief Administrative Officer

June 8, 1983

Honorable Thomas A. Luken
Chairman, Subcommittee on Antitrust and
Restraint of Trade Activities Affecting
Small Business
U.S.House of Representatives
B-363 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Luken,

The American Society of Travel Agents very much appreciated the opportunity to testify before your subcommittee on May 27 on the impact of the Civil Aeronautics Board's recent decision in the Competitive Marketing case. Unfortunately, the hearing schedule had to be shortened due to action on the House floor and a few points were unable to be made. These relate primarily to the testimony offered by the National Passenger Traffic Association. I am submitting the following comments with a request that they be included in the hearing record to clarify certain issues and avoid the possibility of misleading statements going unchallenged.

Initially, it is important to distinguish NPTA's real interest from the general economic arguments on which it purports to rely. NPTA's members have one goal: to force the airlines to compensate them directly for the ticketing services they provide to their own companies. NPTA sees the CAB decision as supporting that purpose, once antitrust immunity for the agency accreditation system is withdrawn, and thus opposes any effort to replace the Board's decision with a result more in keeping with the nature of air transportation services. Standing alone, NPTA's effort to improve the revenues of its members is understandable. Since those companies already had the right and ability to bargain for what they want prior to the Board's decision, however, NPTA's incantation of economic principles must be understood for what it is - an effort to use antitrust threats to gain leverage that will extract from the airlines that which the airlines, in their own self-interest, have been unwilling to pay.

We would also emphasize that most of the testimony supporting the CAB decision presents a distorted picture of the options that were before the CAB and that are before the Congress in H.R. 2053

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and S.764. The choice is not between accepting the CAB decision or endorsing the system that existed prior to the Competitive Marketing case. We know of no one who is advocating a return to the pre-Investigation agreements. The Judge's decision opened the market to significant new competitive forces and that recommendation is the one supported by the industry, including the entire travel agency community.

Now I will turn to a few specific points raised in NPTA's testimony. It makes much of the fact that commission costs for the airlines have increased since 1978. The suggestion is that there is something out of order here, but the problem with this numbers game is that it has no context. The fact is that commission rates for agency services were fixed by airline agreements for decades prior to deregulation and were held substantially constant for a decade at a time. A cartel-set purchasing price obviously would result in a lower rate than could result if competition set the rate. Thus, when the CAB disapproved the commission-fixing agreement in 1980, rates went up. At the same time, the agents' share of ticket sales increased dramatically as the price/service chaos spawned by deregulation drove consumers to the only objective and informed source of information in the market - the professional industry travel agent. Even at increased rates of commission the industry agent was, and is, a bargain for the airlines. The cost of distribution through agents under deregulated market conditions is well below the costs that airlines would incur if they tried to cope with the demand directly. The increases in commission expenses that have occurred are thus not extraordinary in any sense. At today's rates the industry agent probably represents the best buy in retail distribution in any industry in the country.

NPTA also argues that agents have an inordinate ability to influence carrier marketing plans. Several observations can be made. First, any airline that wants to discipline agents by using BTD's as a compensated alternative distribution service can already accomplish that by granting price discounts to those BTD's. NPTA's interest is therefore already protected by the CAB's decision in 1981 to allow direct airline BTD negotiation of price. Second, since commissions are the price of agency services and since agents are therefore the "market" to which commission policies are directed, it is hardly surprising that the market responds when an airline proposes something that is damaging to the agency distribution relationship. That is the normal way that competition works. In a somewhat different, but related, context, the Department of Justice has recently told the Supreme Court:

> The standard adopted by the court of appeals would impede the flow of information between a manufacturer and its distributors that is crucial to the operation of efficient distribution systems, and thus would injure

> consumer interests that the Sherman Act is meant to protect. Distributors are in a position to obtain considerable insight into their supplier's distribution system and into efficiencies that may arise from either the design of the system or the manner in which it is implemented. Distributors who would benefit from a more efficient system have an incentive to communicate their ideas for improvement to the supplier, and the supplier has an obvious incentive to implement efficiency-enhancing ideas, even if they require terminating some distributors. In practical effect, however, the Seventh Circuit's rule could virtually immunize dealers from termination once a competitor has complained. Suppliers who maintain good communications with their distributors would be rendered powerless to take action against disruptive dealers who threaten the efficient operation of their distribution systems, unless the suppliers are willing to run the risk of incurring treble damages with no opportunity to show the procompetitive nature of their actions. This is not, after all, a situation involving communications between competitors - which is the prime concern of Section 1 - but between persons who are cooperating in the sale of a single product and who have ongoing contractual relationships.

Brief for the United States as Amicus Curiae in Monsanto Company v. Spray-Rite Service Corp., at 10-11.

In the United Airlines situation cited by NPTA, for example, United's unilaterally announced plan would have cut a West Coast agent's compensation on a transcontinental $300 fare by 60 percent! It was to be expected that some agents would then say: "if you don't want to pay me, I don't want to work for you." In fact, however, most agents took no action against United because to do so would have interfered with the needs of their clients. The record in the Marketing case shows, in fact, that United's traffic, along with that of its principal competitors at the time, had started to decline before it even announced the coupon compensation plan! Finally, it is worth noting that no alternative distribution system to travel agents that theoretically could develop under the Board's decision (and not under the Judge's decision) can be expected to react any differently to ill-conceived and unilaterally dictated marketing policies that radically devalue the interests of one party to the relationship.

With respect to the Republic Airlines matter cited by NPTA, this did not involve an attempt to lower commissions but rather a failure to meet rate increases offered by competitors during the period of adjustment following CAB disapproval of the commission fixing agreement. The same witness had earlier acknowledged that any business person in a competitive market would try to get the highest compensation "everything else being equal." This I submit, is only the normal competitive process at work. NPTA's conception of competition is apparently limited to a market that produces the end results it prefers.

As to Frontier's attempt in 1982 to reduce existing commission rates, we have again a case of competition at work. Frontier announced a ten percent across-the-board reduction in compensation to agents. Many agents obviously didn't like it. When many major airlines declined to follow Frontier's lead, the commission reduction was rescinded. Competition among the airlines determined the outcome.

Could the CAB's decision, as opposed to the Judge's decision, change the result of a similar incident in the future? It could do so only if it led to the replacement of most of the agency distribution network with some other form of distribution that could in effect take over the agents' function for significantly less compensation. No one has suggested a realistic way that this could be done - indeed the principal thrust of the Board's defense is that no such thing is going to happen. And, in any case, the market structure permitted by the Judge's decision is equally capable of producing a move toward such alternatives.

In short, the problems asserted by NPTA and the Board as to the present distribution system are not founded on the absence of competition but on the particular results that the competition has produced. But the Board's attempt to restructure the market more to its liking is not what the Congress authorized the Board to do.

NPTA has also represented to the subcommittee that Judge Yoder's decision "prohibited" airlines from appointing BTD's, banks, credit card companies and any other firm "to distribute their tickets." These representations are simply not true. BTD's already issue airline ticket stock, as NPTA's testimony elsewhere states. NPTA's objection is not to its role in "distribution"; it is to the size of its "compensation". As for banks and "other firms yet to be identified", they would have two options under the Judge's decision: qualify as an accredited agency, as some banks and American Express have already done, or enter non-agency distribution relationships such as that provided for Ticketron. The so-called "special exception" for Ticketron is actually nothing of the kind, as the Judge's opinion made clear at pages 22-23, 67-68, 81-83. The Judge recommended what he called a "sui generis exception" for Ticketron only with respect to the "ticketing operations" described by Ticketron - in other words the exception was to refer to the type of operation that Ticketron proposed and not to Ticketron itself. The Judge's purpose was explicitly stated:

to avoid any doubt that operations of that type could be undertaken outside the conference programs.

Having started with a false premise, NPTA then leaps to a wrong conclusion - that airlines are "forced to pay the same 10 percent commission on every transaction." NPTA's own testimony elsewhere states that many transactions are compensated at a three percent commission rate. NPTA Testimony at page 11. And it is undeniably the law that any airline and any agent is free to negotiate any rate for any transaction. It is also a fact that commission rates in this industry, as in other industries, tend strongly toward uniformity. The benefits of "averaging" are familiar to all business. Consumers do not pay different prices in a department store based on whether they used a lot of help or no help from a salesperson. And under the Judge's decision, the door is open for any firm to negotiate a no-advice, no counselling, no-service commission structure with any airline that finds such distribution techniques in its interest.

Of course, it must be recognized that there is no "free lunch". An airline negotiating such an arrangement will want to consider the effects of such arrangements on the compensation requirements of its other, full service, distributors, as well as the costs it will incur when passengers use its reservations personnel to gather information and then buy the ticket from a no-service discounter. The legitimacy of these concerns is well-recognized in contemporary economic literature and is the principal basis for the Justice Department's position in the Monsanto case discussed earlier.

Let me now turn to NPTA's discussion of the relationship between in-plant travel agency operations and BTD's. NPTA's description is apparently designed to prove that the relationship is a sham that benefits the travel agent at the expense of the airline and the BTD. But NPTA's assertions make no sense. For example, NPTA says that the typical in-plant agent retains some of its three percent commission "primarily for allowing the BTD to use its plate". This is nonsense for two reasons. First, the commission is paid by the airline, not by the BTD. Second, why would a BTD pay an agent "to use its plate" when, as NPTA elsewhere discuss at length, airlines readily allow BTD's to possess ticket stock and even write interline tickets. Use of the agent's plate gains nothing for the BTD.

The present economic relationship between in-plant agency locations and BTD's is largely a product of a CAB decision some years ago. The Board held that it was lawful for an in-plant agent to reimburse a corporate client for the use of personal and other resources already in place in the BTD facility. The amount of reimbursement, which is now completely unregulated, is negotiated and is therefore determined by competition among agents for the in-plant business and by the value assigned by the corporation to the services offered by agents who seek the in-plant relationship. Since the agent remains responsible to the airlines for all operations at such locations, it must assume the same supervisory responsibility there as it does at any other conference approved location, regardless of the technicality of whose "employees" do the ticketing.

NPTA's garbled analysis of in-plant operations is not therefore a product of unwholesome relationships. NPTA's members simply want more money. They object to the willingness of the airlines to have accredited agents service the BTD-produced segment of the market and to the unwillingness of the airlines to directly compensate BTD's for the services they perform.

But there is nothing unusual about this. The airlines own the "product" and are entitled to make the judgment about how best to distribute it. It is simple to assert that the airlines could save some commission expense by paying BTD's to write their own tickets, but such claims do not account for all parts of economic the picture. The airlines know that the spread of corporate discounting will debase the revenue from their highest yield traffic and will spread well beyond the limited membership of NPTA. The airlines will have to make up these losses from their most price-sensitive market, the discretionary traveller. And they know that shifting this business from agents to direct sales to BTD's will lengthen the time between a sale and receipt of the income. Agents remit sales weekly; corporations dealing direct take much longer to pay, which is a substantial economic benefit no where accounted for by NPTA's testimony.

In short, the airlines have plenty of good economic and marketing reasons for not wanting to do business the way that NPTA prefers.

Finally, I would like to clarify the issue of diversion of business from travel agents, since it has figured prominently in the arguments of both NPTA and the Board. We will not engage the Board and NPTA in a numbers game about an estimate made in 1980, especially since we never expected the CAB to consider the estimate as relevant, regardless of its size. The agency community has not based its objections to the CAB decision on the idea that agents' business should be protected from competition and we do not make such claims now. But since the CAB and NPTA have chosen to make an issue of this strawman, the record should at least be accurate.

The estimate of shifts in market share, referred to at page 15 of NPTA's testimony, dealt with the effects of disapproval of the conference exclusivity rules. It assumed that the conference programs would continue to have antitrust immunity, an assumption that obviously cannot be made now. Moreover, the testimony accompanying the analysis explained the reasons why the results were understated. In today's market, the same analysis would suggest a reduction of more than $700 million in agent sales and $70 million in agent revenues on the most optimistic and unrealistic set of assumptions.

Mr. Chairman, we thank you again for the chance to clarify these points and will be glad to answer any questions that you, the other subcommittee members or staff may have.

Sincerely,

Dick Knodt

Dick Knodt, CTC
President, American Society of
Travel Agents, Inc.

Mr. McCloskey. Thank you, Mr. Knodt. Does the gentleman from Minnesota have any questions?

Mr. Weber. I am going to leave in just a minute. First of all, I want to thank all of you.

I realize you are testifying at this point under duress. On behalf of the committee, I would like to apologize. I think this always happens. We carry it on too far, and then the last people on are always crowded a little bit too much, but I think your point has been well represented.

I just want to get one point on the record. As I understand it there are no other professional standards today other than those established by your association; is that correct?

Mr. Knodt. By ATC, IATA.

Mr. Roberts. I would add to that the Civil Aeronautics Board and the Justice Department both found—the Justice Department in the marketing investigation and this Board—that the standards were reasonable and did not unduly inhibit entry into the travel agency business.

Mr. Weber. The Justice Department found that?

Mr. Roberts. The Justice Department at the oral argument was asked directly are the standards unreasonable, do they inhibit entry into the travel agency business. Counsel for the Justice Department conceded that they were reasonable, they did not inhibit entry into the business, but nevertheless said that they should be ignored.

Mr. Ruden. Mr. Weber, my name is Paul Ruden. I am counsel for ASTA. One further observation along the lines of response to your question. There are some States, a few States, which have enacted travel promoter registration laws. Those States that have enacted such laws uniformly except from the bonding and other consumer protection provisions, agents who have been accredited by ATC and IATA on the grounds that the public has already been protected by the system managed by the airlines.

One of the consequences of the Board's decision is inevitably, if the system the airlines operate today fails, that the States are going to step in and we are likely to find 50 States doing the job that the Airline Conference has done for the last 40 years.

Mr. Weber. I have a lot more questions, Mr. Chairman, but not much more time. Thank you.

Mr. McCloskey. Mr. Bilirakis.

Mr. Bilirakis. I don't want to take up any more time, Mr Weber. I, too, apologize to the gentleman for not being given their fair share of time and I hope they understand the situation. When that bell rings, we have got to run.

We appreciate all of you coming here very much. I have learned an awful lot. I would like to think that we are openminded.

Mr. McCloskey. Would any of you care to specifically respond to comments or observations from other witnesses?

Mr. Ruden. There are a great many comments we could make if time permits. Do you want us to proceed?

In particular, the Chairman of the CAB—there are so many, it is hard to pick—has emphasized the point that the Board was not forcing change on the industry. I suggest that that is not a very realistic way of looking at what the Board has done.

When it stripped antitrust immunity and subjected the industry to the full forces of the Sherman Act at the behest of private plaintiffs and the Department of Justice, that is as much compulsion, given the civil penalties, damages and criminal prosecution to which the industry will be exposed, that is as much compulsion in the real world sense as if the Board had simply ordered the changes directly to be made.

No amount of denials about force changes what is going on here or can overcome that reality.

I also want to emphasize, I think on behalf of all of us who support H.R. 2053, one thing that tends to get lost in the debate, particularly when the opponents of the bill talk about monopolies and protection from competition, is that H.R. 2053 does not restore some status quo prior to the competitive marketing investigation. The administrative law judge who tried this case recommended significant changes in the marketing arrangements that the airlines operated and the industry accepted those changes. Those changes will open the door to potential for substantial new entry into the business, on top of the extraordinary entry that has already taken place in the past. What we are advocating, therefore, is a system of standards and not a return to the situation that existed before. A very substantial change has been directly recommended by the judge. The legislation accommodates those recommendations.

Mr. Luken [presiding]. Pardon me. Wait till I get my breath a little bit. I am sorry that I didn't hear all of your testimony.

As it turns out, that will not be the first of a number of votes. We were afraid we were going to get held up over there for quite a while, but that didn't turn out to be the case, so we can finish this discussion, except that we are a little bit short of members.

Is there anything you want to add while I am collecting my thoughts?

Mr. Ruden. Mr. Chairman, there is one other point. I was in the process of answering the question whether there was anything else we would like to respond to.

Much has been made today and before today about this estimate that the travel agents made of a 2-percent reduction in their market share in the event that the changes ordered by the Board were to take place. Reality, again, is quite different from that. The forecast they are talking about is one made by an expert witness who was retained by ASTA.

Prior to the hearings, prior to seeing the presentations of the other parties, at the direction of the administrative law judge, a forecast of diversion was made. The result of that was a 2 percentage point reduction or $323 million in sales which would, in effect, transfer from accredited agents to Ticketron and to others who might enter the business.

We would not, I think, have made such an estimate in the first place had we not been ordered to because the Board made it clear in prior decisions, as it has made clear in this case, that the question of diversion is not really one that they are particularly interested in. It isn't relevant to the kinds of decisions they make when they are talking about deregulation. It is also the case that the estimate assumed that which is no longer assumable, namely, the conference system would continue as the method by which travel agents are accredited.

So I just don't want the committee to be misled by this reference to one small and incomplete fact from the record of the case.

On today's numbers, incidentally, those two points would be approximately, I think, $400 million. Travel agents have never used that as the basis for their objections to what the Board was doing, and we are not using it as the basis for our objections to what the Board has done today.

Mr. LUKEN. Let me read you this part of the Board's decision for your comment. It is on page 4 of the summary from the CAB's decision:

> Our review of the record in this proceeding has led us to conclude that the forces of competition can be brought to bear on the marketing industry by eliminating those provisions that prevent air carriers from using and compensating persons other than agents accredited by their trade association for selling air transportation.

You wouldn't agree with that, would you? You would agree, as I read it now, "using and compensating persons other than agents accredited by their trade association for selling air transportation," you would agree with the in-house purchases for their own use so that they can make their own deal with the airline for a discount?

Mr. KNODT. They can do anything they want. They simply are not agents. They can purchase airline transportation.

Mr. LUKEN. For themselves?

Mr. KNODT. For themselves.

Mr. LUKEN. But they can't advertise themselves as being agents and serve as agents to the public?

Mr. KNODT. They are not interested in the public. They are interested in their corporations.

Mr. LUKEN. Yes. There is a difference, isn't there?

Do you believe that carriers would fear to meet if antitrust immunity were eliminated?

Mr. ROBERTS. We would go one step further than that, Mr. Chairman. There is what I will call an ongoing dialog between carriers, agents, and agent organizations. The system is constantly under review.

Given what would be a very real fear of an antitrust action, I believe some of the agents and their organizations would be fearful of participating in that kind of dialog. The risk of an antitrust action is very real and maybe some large corporations have their batteries of lawyers and they are used to it.

But an antitrust action could put a small business out of business. It is very real and it would be devastating.

Mr. LUKEN. We really don't know what direction those lawsuits and court decisions would take. It is as infinite as the mind can conceive.

Mr. ROBERTS. Mr. Chairman, I represent a number of travel agents. They are sued in the court every day because people are dissatisfied with the way their beds were made when they got to a hotel room.

I can assure you that when you give plaintiff's attorneys the weapon of the antitrust laws, these suits will take on a new turn.

Mr. LUKEN. This reminds me that this is no longer a nation of laws, but of lawyers.

Mr. **Ruden**. Mr. Chairman, indeed. I participated in a Federal Bar Association seminar on the implications of deregulation for antitrust in this industry just a week or so ago, and a representative from the Justice Department asked me what conduct do you folks want to engage in that violates the antitrust laws.

Well, if it was simple enough to sit down and say, well, there are five things, and three of them clearly violate the antitrust laws, so we will tell our folks not to do that. The other two plainly and incontrovertibly won't violate the antitrust laws so we will tell them it is OK to do those. If the world were that simple and the antitrust laws were that simple, there would be no real problem.

But it is not that simple. Distribution questions, in fact, are one of the most dominant issues in antitrust cases that are active in the courts today.

In fact, the Department of Justice is appearing as amicus in the Supreme Court on the side of the defendant in one of those cases trying to restore some semblance of order after the courts of appeals around the country went off in all different directions on questions having to do with when can a manufacturer terminate a distributor.

So the very complexity of the issues makes it impossible for these conferences to function without the immunity in our judgment.

Mr. **Luken**. Turning to another subject. The CAB is scheduled to go out of existence in 1985. What agency do you believe should take its place or have the responsibility of reviewing conference, and other agreements?

Mr. **Roberts**. We would recommend the Department of Transportation, Mr. Chairman.

Mr. **Luken**. Is that what is scheduled to occur?

Mr. **Roberts**. No. What is scheduled to occur right now is the Justice Department would have authority over these agreements and we believe that it is inappropriate for what is essentially an enforcement agency to have authority over these agreements.

We believe that it is more appropriate——

Mr. **Luken**. I assume the Justice Department is not seeking such a privilege.

Mr. **Roberts**. Well, they have it in the 1978 act. We believe it would be more appropriately lodged in the Department of Transportation that is responsible for seeing that the United States has a well-running transportation system.

Mr. **Archer**. AAA would agree with that, too, very strongly. The authority should be lodged with the U.S. Department of Transportation.

Mr. **Luken**. Could you cite which conference agreements other than the exclusivity agreement would be subject to antitrust attack if immunity is——

Mr. **Roberts**. Well, limited only by the imagination of plaintiff's lawyers.

Mr. **Ruden**. Mr. Chairman, putting aside exclusivity, what you have in the conference is a system of professional standards. The attempt to enforce any one of those standards is subject to antitrust attack.

Indeed, even in a purely voluntary arrangement, were the carriers to attempt to maintain a system in which each of them unilaterally determined only to use agents who had passed through the system, assuming the system could be kept as a practical matter, they would then each be subject to the charge that even though it appears to be voluntary, the whole thing is, in fact, an ongoing conspiracy in violation of the Sherman Act.

In addition, the settlement process that has been discussed here by which 97 million traffic documents were settled last year at a virtually nominal cost requires by concession of all the parties in the case, I think, at this point uniform reporting and uniform remitting cycles.

Consideration is being given to possibilities of making that more flexible. At the present time the technology and the complexity suggest that that is the only way it can be done. There is legal authority that suggests that that is exposed to antitrust attack.

Mr. LUKEN. As I understand it, agents can compete for rights of commission at the present time.

Mr. RUDEN. Absolutely.

Mr. LUKEN. Significantly, we didn't hear this morning any criticism of that practice, or that there was any fixing. Has that complaint been made?

Mr. RUDEN. No suggestion by anyone of any fixing of commissions, to my knowledge, since the commission rate was opened.

Mr. LUKEN. They can do so under the conference agreements, right?

Mr. RUDEN. Absolutely. The conference agreements have nothing to do with the price that is paid for agency services.

Mr. LUKEN. Would the decision of Judge Yoder open the door to other firms than Ticketron?

Mr. RUDEN. Absolutely. This question, Mr. Chairman, was raised at the oral argument by the Board members. Was the door open for real or not?

The uniform answer given by all the parties, at least of those who supported the agreements, was that Judge Yoder had done more than just opened the door to Ticketron, he eliminated a provision from the domestic agreements which was perceived by some to foreclose others from engaging in nonagency ticketing distribution relationships and getting compensated for them. I really don't believe—I could read into the record, although it is already there, the portions of Judge Yoder's opinion which make it clear beyond dispute that he intended to open the door and wrote the words that accomplished the opening of the door. So I don't think a case can legitimately be made that Ticketron is the only one who is going to get in.

Mr. ROBERTS. Mr. Chairman, it should be remembered that Judge Yoder's recommendations go a long way toward changing the then existing system.

We view Judge Yoder's decision as a compromise. It is not exactly what we wanted. But it is one that we can live with. I believe that that is true for the rest of the industry.

Mr. LUKEN. He certainly didn't seem to show any bias in anybody's favor.

Mr. ROBERTS. There were a number of things that we wanted that we just didn't get from him. I think that that is true for most of the parties to the case.

The basic premise that Judge Yoder relied on is he agreed, there ought to be nonagent marketing outlets, but what Judge Yoder did, which the Board has not followed, Judge Yoder has said we will allow these nonagent marketing outlets, but we have also got a good system, let's keep it, modify it a little bit and give it the antitrust immunity that it needs to continue to exist and serve the public well.

Mr. **Luken**. All right. Unless somebody has something sensational that we haven't covered, I think any further discussion would be repetitious.

We have done a full morning's work in the last 3½ hours.

We will deliberate further and decide whether or not any further hearings are necessary. Certainly I think that we have received enough here that there may be grounds for certain action by this subcommittee, at least in the form of making some further recommendation to committees which have the legislative jurisdiction in the matter.

We thank everybody for their attendance today. This session of the subcommittee is adjourned pending the call of the Chair.

We will leave the hearing record open for 30 days so that others may present their comments to the subcommittee in writing. Their comments will appear at the end of today's hearing.

[Whereupon, at 12:30 p.m., the subcommittee adjourned, to reconvene subject to call of the Chair.]

APPENDIX

Travel and Tourism
Government Affairs
Council

1899 L Street, N.W
Washington, D.C. 20036
Telephone 202-293-5407

Air Transport Association
American Automobile Association
American Bus Association
American Car Rental Association
American Hotel and Motel
  Association
American Recreation Coalition
American Sightseeing
  International
American Ski Federation
Association of Retail Travel Agents
Conference of National Park
  Concessioners
Gray Line Sight-Seeing
  Association
Highway Users Federation
Hotel Sales Management
  Association International
International Association of
  Amusement Parks &
  Attractions
International Association of
  Convention & Visitor Bureaus
National Air Carrier Association
National Campground Owners
  Association
National Caves Association
National Council of Area and
  Regional Travel Organizations
National Council of State
  Travel Directors
National Council of Travel
  Attractions
National Restaurant Association
National Ski Areas Association
National [illegible] Association
Recreation [illegible] Industry
  Associat[illegible]
Travel Indus[illegible]
  of [illegible]
Unite[illegible]
Unite[illegible]
  As[illegible]

[illegible] Members
[illegible] T. Ash[illegible]
  [illegible] Preside[illegible]
  Industry A[illegible]
  Inns, In[illegible]
Charles Gillett[illegible]
  New York [illegible]
  Visitors [illegible]
Howard [illegible]
  Presid[illegible]
  Chief [illegible]
  The Sheraton Corpora[illegible]
Robert Juliano, Legislative
  Consultant, Hotel Employees
  and Restaurant Employees
  International Union
James Montgomery, Chairman,
  President and Chief Executive
  Officer, Pan Am World
  Services, Inc.
Hugh H. Smith
  Senior Vice President
  Government Affairs Office
  American Express Company

James E. Gaffigan
  Executive Director

An Affiliate of the
Travel Industry Association
of America

June 6, 1983

The Honorable Thomas A. Luken
Chairman, Subcommittee on Antitrust &
 Restraint of Trade Activities Affecting
 Small Business
Committee on Small Business
U.S. House of Representatives
Room B-363 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Luken:

As President of the Travel Industry Association and Vice Chairman of the Travel and Tourism Government Affairs Council, I appreciate the opportunity to set forth, for the record, the position of the industry with respect to H.R. 2053, the Air Travelers Security Act of 1983.

The travel industry is now the second largest retail industry in the United States, having generated (in 1981) $191 billion in receipts and $17.9 billion in federal, state and local tax revenues. It directly employs 4.5 million Americans at every level of skill and indirectly provides another 2.2 million supporting jobs. There are over 1 million U.S. businesses serving the traveler and, paralelling the travel agent segment of our industry, nearly all are small businesses (as classified by the Small Business Administration). It is thus particularly appropriate that you have convened hearings that focus on this industry and we are grateful for the Subcommittee's interest.

The Council is the national organization representing the unified travel industry viewpoint on legislative and regulatory issues of common concern. Council membership is comprised of 28 of the largest travel and tourism national trade organizations, reflecting the diverse nature of the industry which includes transportation, food services, accomodations, attractions, tour sales and travel agencies.

While the decision rendered in the Civil Aeronautics Board's Competitive Marketing Investigation will vary in its impact on each of these components, it is clear that the implementation of any federal policy arising from this case will widely affect the industry as a whole. It is for this reason that the Council has established a task force to address this issue, on which I serve as Chairman. The task force is comprised of the following organizations, many of whom have presented testimony before the Subcommittee.

Travel Industry Association of America
American Automobile Association
Air Transport Association
American Sightseeing International
Holiday Inns, Inc.
Association of Retail Travel Agents

American Express Company, which also contributed to task force discussions, has no objection to the CAB's decision, and is therefore opposed to H.R. 2053.

The task force concluded that the travel agency system offers important advantages to both the travel and tourism industry and the traveling consumer. We are justifiably concerned that, absent an equally effective distribution system, destruction of the agency system may result in serious adverse consequences for the public and the travel industry, including the potential economic dislocation of over 18,000 small businesses.

It is important to note that airlines depend on ATC - accredited travel agents for 60 percent of their domestic ticket sales and at least 75 percent of international ticket sales. The accreditation system provides airlines and many other segments of the travel industry with direct marketing and selling access to communities throughout the nation, including those remote from individual locations of industry facilities and airline route systems. This system, which is currently threatened by the CAB's decision, has very effectively met the consumer need for easy access to experienced travel advisors competent to counsel and inform travelers about travel and transportation options. Further, interline agreements and accompanying antitrust immunity, are an essential element of the consumer convenience the public has come to expect over the the last 40 years.

In addition, we question the Board's allegations that the agreements and accreditation standards at issue are, in any way, anti-competitive. In 1982, for example, an average of 5 new agency locations were opened every day. Few other industries can cite a similar rate of market entry.

It is for these reasons that the Travel and Tourism Government Affairs Council supports H.R. 2053, "The Air Traveler's Security Act of 1983."

Sincerely,

William D. Toohey
President
Travel Industry Association

WDT:sds

FOX
TRAVEL INC.

"Travel Unites the Peoples of the World"

MEMBER AMERICAN SOCIETY OF TRAVEL AGENTS ASTA

SUITE 404 CAREW TOWER CINCINNATI, OHIO 45202 PHONE 513-621-0310

June 10, 1983

The Honorable Thomas Luken
2342 Rayburn House Building
Washington, DC 20515

Dear Congressman Luken:

In your capacity as Chairman of the House Subcommittee on Small Business, I wish to thank you for conducting the May 24th hearing on the CAB Competitive Marketing Investigation case. As neutral observers, you and your committee are to be commended for the manner in which you separated fact from fiction.

As you know, with few exceptions, all travel agencies fall into the category of Small Business. Should the CAB decision be permitted to stand, most of these businesses and the many safeguards that were developed over a period of forty years to protect the airlines and the consumer, will be eliminated.

You may be interested in a few statistics taken from a study I was recently commissioned to do for Air New Zealand: As of November 20, 1982 there were 614 Air Traffic Conference (ATC) appointed travel agencies in the state of Ohio. This figure represents an 11% increase in the number of new travel agencies over the previous year. The average number of people employed in each agency is 6 and the estimated projected gross sales of air line tickets for 1983 will be 1,178,827 per agency. On a direct line, east to west across the state and from Worthington south to Kentucky, there are 129 ATC appointed travel agencies who sell a minimum of one million dollars in air travel annually.

Such figures serve to emphasize the valuable service travel agents provide the consumer as well as the airlines. More significantly, compared to other industries, I think you will agree that an 11% growth in one year represents a significant increase for any industry...particularly in Ohio. Since 1959, when the Justice Department ruled that the standards used by the Air Traffic Conference in appointing and accrediting travel agents was in violation of the Restraint of Trade Act, the national annual rate of proliferation stands at 10%. The growth pattern over a sustained period of 22 years, gives clear evidence that all undue burdens allowing free entry to anyone wishing to sell air tickets, was lifted long before the CAB decided to "reinvent the wheel".

As a result of the CAB decision, one of the greatest concerns to the twenty-two thousand U.S. travel agencies and their employees (approximately 60% of which are women) is the vicious campaign being waged by the National Passenger Traffic Association. I'm sure you are familiar with the organization and the undue pressure they are exerting on our nation's economically sick airlines. The NPTA seeks the same commission for serving their

.. continued

own in-house corporate travel as the professionally trained, accredited ATC appointed travel agent. They are self-serving while the travel agent serves the general public.

As evidenced by the enclosed New York Times ad, the NPTA would have the public believe that travel agents (the small business man) seeks a monopoly in selling air tickets. This is totally untrue. Travel agents have always operated in a free market place and never have we objected to fair competition.

In Greater Cincinnati there are currently three major corporations who are members of NPTA - Procter and Gamble; The Kroger Company, and Armco Steel. Recently in New York, Allied Chemical, a member of NPTA, announced their intention to enter the leisure/vacation travel market in addition to serving their own in-house corporate travel. They justify their decision by citing the thousands of people they employ as a new, ready-made captive travel market.

While to date, none of the NPTA members in Greater Cincinnati have shown any indication of following Allied Chemical, the CAB has made it both inviting and possible. Given the fact that both P & G and Krogers have diversified long ago from just selling their soap and groceries, either or both may well want to become retailers of airline tickets and other travel products at some future date. In that event, none of the 45 privately owned travel agencies in Greater Cincinnati could hope to compete with such competition.

As a member of the National Government Affairs Committee of the American Society of Travel Agents and owner of a travel agency in Cincinnati the past 18 years, I am extremely grateful to you and your Committee for your continued vigilance over the fate of the travel agency industry. I also want to thank you for co-sponsoring HR 2053. This bill achieves what the CAB intended without subjecting the airlines, the consumer and the independent travel agent to the negative effects of the CAB's decision.

At some time in the near future, I would like to meet with you in Cincinnati to discuss other issues that are a grave threat to Cincinnati travel agents. In the meantime, I am pleased to enclose an article from the May 24th edition of the Cincinnati Post which you may find informative.

I apologize for the length of this letter but I know you are interested in judging this matter from a local position, as well as national.

Sincerely,

Joseph P. Hofrichter

JPH:eg

cc: F. Goranin, Chairman, ASTA Natl. Government Affairs Comm.
J. Bennison, V.P. ASTA Government Affairs

While your corporation is playing Risk, travel agents are playing Monopoly.

Join the Action Symposium on Business Travel at New York's Roosevelt Hotel, May 20 and learn how to cut your business travel costs.

Business travel is a very big game. In domestic airline revenue alone American industry shells out over $20 billion annually. What's worse is the cost of business travel is rising. And now, travel agents are lobbying to have their monopoly of airline ticket distribution continued. The result, higher air fares.

Business can fight higher travel costs

The National Passenger Traffic Association (NPTA), on behalf of business, won the right to deal with airlines directly in the areas of ticket prices and distribution. The business people who are the NPTA, acting as individuals, need your active corporate participation in order to preserve the gains they've achieved for the business traveller. Your company can help them do that and make the travel industry listen and listen closely to their biggest customer—you.

How to make your voice heard and cut the cost of business travel

On May 20, 1983, the NPTA is hosting an Action Symposium on Business Travel at New York's Roosevelt Hotel. At this crucial meeting travel experts from leading corporations—Allied Corporation; Conoco; Lockheed; Hewlett Packard; WR Grace & Company; National Distillers & Chemical Corporation and Bristol Myers—will discuss a wide range of issues central to corporate travel: air fares, hotel accommodations, surface transportation, relocation of personnel, frequent fliers and more. The airline ticket price and distribution topic is just our first important step. Valuable cost saving procedures will be covered during this daylong symposium.

Send your executive in charge of travel

This meeting could decide whether you pay more or less to send your people where you need them most. Let's join together and tell the travel industry, which needs the business traveller, that the business traveller wants to be treated in accordance with his importance. Please send your executive in charge of travel to this landmark meeting. The Symposium fee is $200 per person. Mail the reservation coupon today, and join with the National Passenger Travel Association in paving the way for the fair treatment of corporate travellers.

Please make checks payable to NPTA and mail to:
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100 East 42nd Street, New York, New York 10017.
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The Post Tuesday, May 24, 1983

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Travelers up in air

By Don Andriacco
Post Staff Reporter

If you think you've been confused by the constant changes in air fares and service since airline deregulation, pity the poor travel agents.

It's their job to keep track of hundreds of air routes and thousands of fares. Even with computers it's difficult.

And now the travel agents face a new phase of travel industry deregulation—a Civil Aeronautics Board decision ending their monopoly on the sale of airline tickets.

If it is allowed to stand, the decision could allow your neighborhood grocery store or a department store in the suburbs to sell airline tickets. And that prompted Airline Executive magazine to ask in a story about travel agents earlier this year: "Are they endangered species?"

This era of dramatic changes for the travel agent business began with the original airline deregulation in November 1978.

"All of a sudden we didn't know who was flying where, when and how," recalled Joseph Hofrichter, consultant to Fox Travel. "We couldn't keep track of it."

Now that they were free to leave unprofitable markets, airlines did so with a will. "It was the consumer who bit the bullet when service was interrupted to many cities," said Hofrichter, a critic of deregulation.

Even Greater Cincinnati International Airport, which has since enjoyed dramatic increases in air service, saw a 20.3 percent drop in average weekly airplane departures in the year following deregulation, according to airport figures.

And fares went wild. Hofrichter, a 37-year veteran of the travel business, calls it "one of the most gigantic, chaotic messes we have ever seen in any industry."

The Cincinnati-New York route alone, for example, has 40 different fares, linked to such factors as when the traveler leaves, how long he is staying and how long in advance he buys the ticket.

"There are so many different fares that your agent has to know not just the coach and first class but every special fare, every promotional fare," said Judith Pittman, manager of Fifth Third Travel. "You don't want one of your customers on a plane sitting next to someone who has paid less than he did."

The airlines used to have to file notice of a fare change 30 days in advance with the Civil Aeronautics Board, which had to approve the change. Freed of that requirement by deregulation, the carriers can drop their fares overnight—and sometimes do in the scramble to undercut the competition and preserve market share.

"There is no long-range marketing strategy," Hofrichter grumbles. "It is all short-range." He said at least 70 percent of all airline tickets sold last year were discounted.

Discounted fares meant lower earnings per ticket for travel agencies, which make their living on the commissions paid by airlines, hotels, bus companies, car rental firms, steamship lines and sightseeing attractions.

They had to sell more just to stay in place.

"We feel we picked it up in volume," Mrs. Pittman said. "Of course it was more work."

But travel agents appear to agree that, as Hofrichter put it, "the golden age of air fare for the consumer is about over." Many of the heavily discounted fares have been abolished.

That does not mean, however, that fares or routes have stabilized. They are still subject to rapid change. To keep up, travel agents use computer systems supplied by the airlines—American's SABRE system, United's Apollo, TWA's PARS or Delta's DATAS II.

"American and United airlines have a dominance in the airline computer systems established in travel agencies," said Michael Bowers, director of the Cincinnati Automobile Club's World Wide Travel Agency. "Both systems are excellent and we can live with the minimal bias which is built into both systems."

The computer systems store information on flights of all airlines. But critics complain that those of the sponsoring carrier tend to show up on the computer terminal screen first. There is also a problem regarding fare data:

Fares of the sponsoring carrier are programmed into that system overnight. But those of other airlines can lag a day or two if the other airlines are slow about getting their changes to

MAY 24 1983

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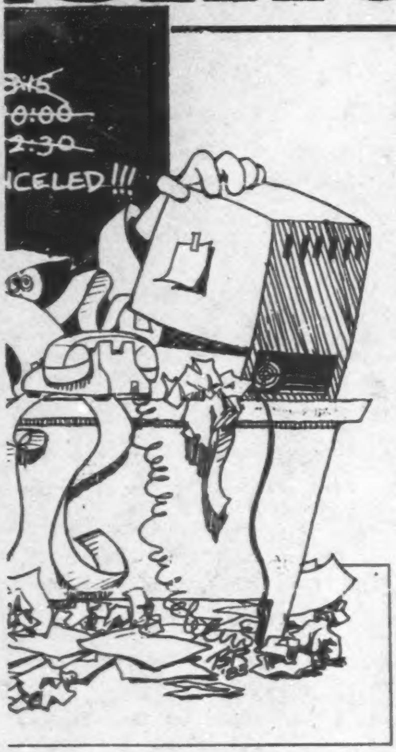

, agents on fares

competitors' systems or into a master computer bank used by all systems.

That may be a small problem for travel agents compared to the possible effects of a Civil Aeronautics Board ruling due to take effect at the end of 1984. The ruling wipes out the 40-year-old system under which only airlines and their accredited ticket agents—the travel agents—are permitted to sell airline tickets.

Legislation has been introduced in Congress to overturn the CAB decision and replace it with the recommended order of an administrative law judge. The judge wanted to keep intact the basic framework of the airline ticket distribution system.

The 22,000-member American Society of Travel Agents and a host of other travel industry associations strongly support the legislation. Hofrichter, immediate past president of the Mid-America chapter of ASTA, predicts the number of Cincinnati travel agencies will shrink from 45 to fewer than 10 if it doesn't pass.

Other travel agents say they aren't worried by the prospect of Ticketron and department stores selling plane tickets.

"All the major airlines have stated publicly that they consider travel agencies to be their best marketing system," noted World Wide's Bowers.

Added William Canedy, group sales manager and counselor at Carousel Travel in Western Hills:

"It's going to boil down to people going where they can get good, competent, efficient service. Maybe when they get an example of buying (a trip) in a supermarket and finding it's a sad mistake, they'll come back to a travel agent."

What worries Hofrichter is the possible entrance into the travel agency business of what he calls the "heavy-hitters," the Fortune 500 companies.

He sees it as a case of "the large multi-national corporation trying to put the small businessman out of business."

The great majority of travel agencies are indeed small. In southern Ohio, the average number of agents per agency is six. The largest agency in Greater Cincinnati is World Wide, with 95 employees and 11 branch offices.

Fifth Third Travel, formerly Taft Travel, has 17 employees and one location, on the skywalk in downtown Cincinnati. But Fifth Third Bancorp's recent purchase of the agency from Taft Broadcasting gives the agency the use of another 37 offices—the branches of Fifth Third Bank.

Tickets can be delivered by messenger to a Fifth Third office for pick up by the customer faster than they can be sent through the mail, pointed out Harold Girkin, vice president of Fifth Third Bancorp.

Girkin sees that as a competitive advantage in a highly competitive business.

"You're not going to be opening 37 different offices if you just have a travel agency," he said. "Bearing in mind the number of branches, the service can be a lot more convenient for corporations."

Corporations account for 90 to 95 percent of Fifth Third Travel's business, Mrs. Pittman said. They also represent the fastest-growing segment of the travel agency business, according to Hofrichter.

"Commercial has really taken off like a wild bandit," he said. "We're probably looking at more commercial today than vacation—only because travel agents have given up a large portion of the vacation market to pick up commercial business."

The reason for that is a change in the commission structure. Members of the Air Traffic Conference—virtually all domestic air carriers—agreed in March 1981 to pay a commission of 10 percent on all ticket sales, with no bonus.

Up to then the airlines were paying 7 percent, with an additional 3 percent "override," or bonus, for selling an approved tour. That made selling leisure travel more profitable for the travel agencies who could generate a lot of tour business.

With the possibility of a commission override for leisure travel sales gone, Hofrichter said, commercial travel is more profitable because it can be processed faster.

Airline tickets can be bought and hotel reservations lined up in a matter of two or three minutes for the business traveler, Hofrichter calculates. But he figures it can take perhaps two hours to get a sight-seeing vacationer set up.

"Probably every agent has a certain mix of commercial as opposed to vacation travel," he said. "Travel agents are changing the mix today."

Edison Travel, Inc.

INDIVIDUAL AND GROUP TRAVEL

ROUTE 27 & PARSONAGE ROAD
EDISON, NEW JERSEY 08820
(201) 548-4252
(212) 732-2480

May 31, 1983

The Honorable Thomas A. Luken
U.S. House of Representative
Sub Committee on Anti-Trust and Restraint of
Trade Activities Affecting Small Business
Raybrun House Office Building Room B-363
Washington, D.C. 20515

Dear Congressman Luken:

It was a privilege to have been observers at your sub-committee hearing Tuesday, May 24. We were pleased to discover how well prepared and knowledgable you and your colleagues were, and at the pertinent questions you asked the witnesses.

May we take a moment to introduce ourselves:

Bernice Rosmarin, CTC, Co-owner and Vice President of Edison Travel, Inc.- a full service retail travel agency since 1965.
President of New Jersey Chapter of American Society of Travel Agents (ASTA) for 5 years.
Served as elected delegate to the First White House Conference on Small Business in 1980.

Constance Carey, CTC, Co-owner and Vice President of Colonia Travel, opened in 1976.
Currently treasurer of New Jersey Chapter of ASTA.

Although H.R. 2053 may not be considered crucial legislation to the nation, it is very important to us as small business people, and it was good to finally feel there were legislators who could cut through the rhetoric and understand the danger to the travel agency industry and the approximately quarter of a million people employed therein.

We respectfully request that you enter the enclosed statement and petition into the official record of your hearings.

Yours very truly,

Bernice Rosmarin

Connie Carey
Constance Carey

Enclosures

Professional Planning With A Personal Touch

ASTA
American Society of Travel Agents

STATEMENT

Objectivity: Travel agents are the only unbiased objective source of information to the consumer for the total travel product-- air schedules and fares, cruises, rail transportation, car rentals, bus tours, hotels, etc. The CAB decision risks dismantling this distribution system with nothing practical to take its place. They offer only theory and philosophy as reasons for potentially destroying a system that has served the public, the carriers and the agents well for 40 years.

The only opposition to H.R. 2053 seems to come from the CAB and the NPTA and their Business Travel Departments (BTD) who are purchasers, not sellers of travel. They are already free to negotiate volume discounts with any airline, and therefore lower their companies' travel costs, but BTD's should in no way be considered agents, who are sellers of the product, and deserving of the commissions earned.

Because virtually all travel agencies are small businesses, few of us can take the time to visit Washington and voice our concern. We are, therefore, submitting this petition, signed by approximately 700 travel industry personnel and our customers, to demonstrate how strongly an area of New Jersey feels about this issue.

May 3, 1983

The ability to use the services of professional travel agents is being jeopardized by recent actions of the Civil Aeronautics Board. If put into effect, they would undermine the accredited travel agent system, and would likely cause many inconveniences when attempts are made to arrange and carry out travel plans. These inconveniences include the ability to easily use one airline ticket on any of 150 domestic and international airlines, the ability to identify a professional travel counsellor who is authorized to act on behalf of all travel suppliers, and even the ability to check bags through to their final destination. They are also likely to increase costs.

Travel agents today have to meet standards that prove their financial integrity and professional competency. These standards have benefited our customers. Without acceptable standards, we as travel agents, feel that travellers will be exposed to financial risks and unnecessary inconvenience. The airlines agree. So do many senators and congressmen who have endorsed legislation, called the Air Travellers Security Act of 1983, which would insure the continuation of the accredited travel agent system.

We hope by this petition to bring to your attention the need for your support of this important legislation - S.764 in the Senate, and H.R. 2053 in the House.

IMPORTANT MESSAGE FOR AIR TRAVELLERS

Your ability to use the services of professional travel agents is being jeopardized by recent actions of the Civil Aeronautics Board. If put into effect, they would undermine the accredited travel agent system, and would likely cause you many inconveniences when you attempt to arrange and carry out your future travel plans. These inconveniences include your ability to easily use your airline ticket on any one of 150 domestic and international airlines, your ability to identify a professional travel counsellor who is authorized to act on behalf of all travel suppliers, and even your ability to check your bags through to your final destination. And, they are also likely to increase your costs.

Travel agents today have to meet standards that prove their financial integrity and professional competency. These standards have benefited you, our customers. Without acceptable standards, we as your travel agents, feel you will be exposed to financial risks, and unnecessary inconvenience. The airlines agree. So do many senators and congressmen who have endorsed legislation, called the Air Travellers Security Act of 1983, which would insure the continuation of the accredited travel agent system.

WHAT CAN YOU DO

We need your help to persuade all Senators and Congressmen to support this important piece of legislation. Please take a minute of your time to sign the attached form asking your legislation to co-sponsor and vote in favor of these bills S. 764 in the Senate, and H.R. 2053 in the House.

1 Susan Campanello
2 Cynthia Harris
3 Carol Moore
4 Debbie Brinkofski
5 Frank Vinceglio
6 Mark Wakefield
7 J Tuttle
8 G B Umholtz
9 C L Umholtz

10 James R Umholtz
11
12
13
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17
17

MAY 23 REC'D

RENTZ TRAVEL AGENCY

"WHERE IN THE WORLD DO YOU WANT TO GO?"

TELEPHONE: 589-2442
517 ATLANTIC AVENUE
BOX 596
MORRIS, MN 56267

AIR
TOURS
CRUISES
AMTRAK

May 19, 1983

Honorable Vin Weber
United States House of Representatives
B-363 Rayburn House Office Bldg.
Washington, D. C. 20515

Re: Air Travelers Security Act of 1983
H. R. 2053 and S. 764

Dear Congressman Weber:

I received your letter of May 16, 1983, asking for my views for the hearing record as applies to the above bill.

I wish to thank you for this inquiry, as I feel this is very important legislation to protect the traveling public. The Travel Agency system of today, with its acceptable standards, protects the traveling public from financial risk and unnecessary inconveniences.

I strongly feel that if changes authorized by the C.A.B. are allowed to go into effect, they would undermine the accredited travel agency system, and would cause the public traveler many inconveniences when they attempt to arrange and carry out their travel plans.

Congressman Weber, I am indeed pleased with the dedicated work and effort you have given as a co-sponsor of H.R. [illegible]053. If there is anything else that I may do in support of this important bill passing, please let me know, as I will be following the hearings very closely.

Thank you.

Very truly yours,

RENTZ TRAVEL AGENCY

D. F. Rentz, Owner
Morris, Minnesota 56267

DFR:rs

THE COUNTRY TRAVEL STORE
124 W. Broadway, P. O. Box 177
MONTICELLO, MINN. U.S.A. 55362

Monticello: 295-3350
Metro: 339-1667
Minn. Watts: 1-800-752-8152

May 20, 1983

Vin Weber, U.S. House of Representatives
Sub-Committee Anti-Trust
B-363 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Vin,

Deregulation has caused the world's best airline and travel agency industries into complete chaos. What was the best is now the most confused.

Deregulation has also cost the consumer of the midwest a lot of money. It is not uncommon for someone to fly cheaper from Coast to Coast than it does to fly to Northern Minnesota ($128.00 One Way).

The C.A.B. has taken a stand that will ultimately bury the industry as we now know it. Everyone I know who is an authority on the subject, favor Judge Yodors decision. A vote against the C.A.B. marketing concept is a vote for small business survival.

Sincerely,

George E. Johnson
THE COUNTRY TRAVEL STORE

GEJ/mj

Full Service Travel Agency
Airlines — Hotels & Resorts — Tours
Fly-Drive — Cruises — Super Saver Fares

WHERE IN THE WORLD ARE YOU GOING?

World Travel

MAY 27 REC'D

May 23,1983

The Honorable Vin Weber
Subcommittee on Antitrust and Restraint of Trade Activities
B-365 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Weber:

I thank you for the opportunity to voice my convictions on the pending legislation relating to the CAB, the accredited travel agent system, and an integrated air transportation system.

I have been a travel agent, appointed and qualified, for twenty years. We operate offices in Hutchinson and Willmar,Minnesota. During the past twenty years there have been many changes in the concept of air travel, and the Agent's responsibility to the customer.

One thing has become very apparent in the recent changes that have been promoted. That is the fact that the customer (the ordinary uninformed citizen) is again being "used" by the industry under the guise of making the cost of travel more reasonable and readily available.

Noone works harder for the private citizen in helping him to secure low-cost and safe air travel than the local travel agent. In the past we have represented all of the approved airlines, and have held ticketing authority on most of them. We have constantly sought out the best rates and the best schedules for our clients--with no regard to what commission we can earn from this effort.

The deregulation of the airline industry has opened the door to new scheduled service by a number of unqualified carriers. At the same time, the wide-open marketing rules --which have permitted the carriers to file and use any airfare they choose (whether justified or not) have precipitated the demise and ultimate failure of many formerly reliable carriers. Eventually we will see four or five giant carriers, who will control the market and there will be no rate competition.

At the same time, we are seeing a great influx of "opportunists", who view this open market as the time to move in and collect as much "gravy" as the promotional market will bear, even with no sincere intentions to remain in the business to serve their clients later.

We believe that the best interests of the public can be served only through a qualified, controlled marketing system, accountable to some traffic and transportation system. We believe the qualified travel agent can best do that job. And where else can you find an organization that can operate a complete sales, promotional, accounting and marketing system for 10% of the retail price of the product, or even less?
Yes, we will thank you for the efforts you put into preserving the Agency System--and so will the public--your constituent.

Sincerely,
W.A. Holland
W.A.Holland

132 Main St. So., Hutchinson, Minnesota, 55350 Telephone 612/879-4444

Haynes
503 West Main Street
Corner 5th & Main
Phone 532-6362
MARSHALL, MINNESOTA 56258

MAY 23 REC'D

5-19-83

Name U.S. House of Representatives
Street Attn: Vin Weber
City Washington, D. C. 20515

Re: C. A. B. / Deregulation
Travel Industry

Dear Mr. Weber

I started our travel agency in 1962 when most travel agencies were found in cities at least 2-3 times the size of Marshall which was about 6,500 people at that time.

As the years past, even I was surprised at the increase in travel volume, both in our agency and the trade as a whole. There are many reasons for this growth and most are obvious in relation to social and economic attitudes and conditions. What is less obvious is the impact of the local travel agent and the development of quality wholesale travel industry operators as a result primarily of the market created.

The demands made of the travel industry may be compared to those of education in that the services expand proportionately to the public it serves, and their sophistication. As in both situations we've observed; there must be a balance of regulation of standard and and the development of a free market based on a rather complex supply and demand. Complex for the reason that 'markets' can be created. Good examples are; McDonalds, Playboy, Condo time-share, sportscars, etc. Where supply and demand intersect depends on marketing and consumer attitudes. They're obviously so interrelated that one could devote forever trying to define the complexity.

Pertinent to travel however regarding the "creation" of markets is for example, Las Vegas Cancun, Hawaii, etc. The ideas of destination gain momentum with various means such as the availibilty of transportation and accomodations While climate and locale are important, the demand may often follow the complex marketing strategy in many cases such as Mexico.

Important destinations for whatever reasons they might be important may be less accessible in proportion to lower profile. The public has come to regard travel and travel experience with status and "symbols" not unlike that of what one may drive as an automoblie and where and in what type of "home" they live.

Even more important than what we drive and where we live is where we've been...and what we have learned, or "know" if you will. This trend is largely good and beneficial to society and demands sincere and rational inquiry in how to best serve its needs. Travel is irretrievably in our blood and rightfully so. We must observe and experience the world in part or
(2) whole, to help it and ourselves. (1)

You will find in our industry generally intelligent people, well educated and well traveled. Those who do not have the ability to meet the incredible public demand will not survive the highly competetive nature of the business.

Most importantly though, it is not merely "business". It is an advocation of ideas & economy which vary with the individuals we serve. We operate "stores" of travel services and ideas. We are the "clothiers" of the travel trade. We must fit individuals with the the quality they can both afford and wear -comfortably, We must regard the service in light of the ultimate utility.
Deregulation serves to increase competition has resulted in a "purge" in some intances of the industry as a whole. We've seen casulaties -in Brannif, Laker, and service to MANY small communties throughout the United States and beyond. Some of this is necessary to attain social ends that are ultimately desireable. We can not and will not attain those desired ends if we all compete ourselves to death however. We must maintain assurance of quality with some regulation, or the middle class travler will lose to some extent opportunity, desire, ability and even willingness, to travel

RETAIL TRAVEL AGENT
ULD SURVIVE - OF
NECESSITY

Thanks

Haynes

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